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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 MARK I. SOKOLOW, et al.,

4 Plaintiffs,

5 v.

04 CV 397 (GBD)

6 PALESTINE LIBERATION ORGANIZATION, et al.,

7 Defendants.

8 New York, N.Y.  
9 January 6, 2015  
11:00 a.m.

10 Before:

11 HON. GEORGE B. DANIELS,

12 District Judge

13 APPEARANCES

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Attorneys for Plaintiffs

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(Case called)

THE COURT: Good morning. Let me first deal with some procedural issues. I understand that, as we speak, the motion for the circuit has been submitted today on the calendar. I believe it is my recollection that the panel that is hearing argument today, which consists of Judge Lynch, Judge Chin, and Judge Colton, my review of the docket is that they only have 10, 15 minutes of oral argument today on other cases and all the other cases are submitted. They may be finished oral argument maybe, from my experience, if it is a visiting judge, maybe they are the robing room as we speak discussing the submissions and discussing this issue. Even if while we speak I get some notification from them, I'll let all the parties know while we are discussing the other issues.

There are a number of issues that need to be resolved procedurally. First of all, I reviewed your request for modification of the jury questionnaire. I have made some changes. I wouldn't call it a redline copy, but you have a copy that indicates what changes that I have made and in response to your request and a clean copy with regard to the questionnaire. You should take a look at that when you can.

I anticipate that we are still on schedule to bring this jury panel in here. You have at least two to 300 jurors coming in here tomorrow and being prepared to have them proceed with the questionnaire. If you have some strong views about

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1 something that you requested that you feel that I have not  
2 adequately addressed and you want to raise that now or before  
3 we see the jury tomorrow, let me know. What you have been  
4 given is not what I think is an appropriate response to give in  
5 the nature of the request and the nature of the objection to  
6 get some relevant information that you think might be helpful  
7 in selecting a jury.

8 I have also given you a draft, which is only a draft,  
9 of the basic comments that I am going to make to the jury in  
10 the jury room before they fill out the questionnaires to  
11 appropriately tell them what their task is going to be and what  
12 will be expected from them so that we can have them efficiently  
13 and effectively and candidly give us responses to the  
14 questionnaire.

15 There was an issue raised the last time we spoke and  
16 then raised by letter from the defendants with regard to the  
17 number of jurors. I will agree with the parties, and my  
18 recollection is wrong at least the more current recollection,  
19 that I believe that the appropriate number of jurors is between  
20 six and 12. We will pick 12 as requested by defense. We will  
21 get a verdict with whatever number six or more that are here at  
22 the end of this trial. Hopefully it will be the 12, but any  
23 number between six and 12. Therefore, the jury selection  
24 process will focus on finding 12 qualified jurors.

25 Bear with me so I can keep everything organized in my

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1 mind in terms of everything. Over the last few weeks, there  
2 was some concern or objection raised by the defense with regard  
3 to the process of selecting or at least seating jurors for  
4 possible selection. I did hear briefly I think it was on by  
5 the defense. What I have attempted to do is to give the  
6 parties an opportunity to choose jurors from among those people  
7 that they felt at least affirmatively or otherwise qualified  
8 based on the questionnaires to be jurors.

9 I am not sure what really motivates the defense's  
10 objection to that, since the alternative is to put ahead of the  
11 people the defense says that they believe will qualify and they  
12 may want to see as jurors, to put ahead of them people who the  
13 plaintiffs feel are people they want and the defendant hasn't  
14 designated those people as people that they want. I am not  
15 sure why you would want that.

16 This was not a trick question. It wasn't to prejudice  
17 you. I wanted to give both sides an opportunity to know that  
18 the first people that are available to choose from are people  
19 that you have made a decision, both sides made the decision,  
20 all things being equal, that that is the person that you would  
21 take, unless you wanted to exercise a preemptory challenge. If  
22 you don't want that, I will consider whether or not, unless  
23 there is a challenge for cause, whether you have a preference  
24 or not that even if both sides have a preference for a juror,  
25 if there is a juror that sits before them, there is a number

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1 before them at random, that juror is going to be the juror  
2 rather than the one that you both want. As I always say, be  
3 careful what you ask for, you may get it.

4 Defense, is it your position that you prefer that,  
5 unless there is a challenge for cause, that the person that you  
6 have now designated as somebody you thought was qualified as a  
7 juror and the other side has designated that they thought was  
8 qualified as a juror, that that person should go ahead of the  
9 person you both believe would qualify to sit as a juror? Maybe  
10 you didn't understand my process.

11 MR. ROCHON: There is a good chance I didn't. Let's  
12 see. I think the court anticipated that the parties would send  
13 in the chart ex parte so that I would not see Mr. Yalowitz's  
14 and he would not see mine. That was one of our concerns, just  
15 to make sure that we are aware if people are being bypassed as  
16 unacceptable, and we have a concern that maybe they're being  
17 bypassed for reasons we would like to address with the court or  
18 Mr. Yalowitz, that gives us concerns. I see the court's  
19 expression. Maybe I had something wrong?

20 THE COURT: That is not what I intended. Again, I  
21 didn't intend to prejudice you or anybody with regard to that.  
22 I don't have any problems telling you how these people were  
23 received and how they will be seated. I anticipate that, since  
24 we only need 12, the number is even smaller, the first 18  
25 jurors hopefully will be the first 18 people that you both said

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1 that you would like, you think should be voir dired and you  
2 think all things being equal, other than exercising your  
3 peremptories, this person is acceptable to you. That is the  
4 way I intended to do it.

5 Now, if I can't get 18 of those people or more of  
6 those people, I probably would try to do 25, 30, at least. If  
7 I can't seat those people, then after I have exhausted the  
8 people you both say you are okay, this person sort of looks  
9 fine to me, I will start alternating between the person that  
10 they say is fine and you don't say you have an objection for  
11 cause, and then the person you said was fine and didn't have an  
12 objection for cause.

13 We may never get there because you may both give me 30  
14 people that you both say, or 40 people that you both say are  
15 acceptable for voir dire, and I will seat those 30 or 40 and  
16 then you will further inquire of them and you then will  
17 exercise your peremptories with regard to that.

18 MR. ROCHON: I apologize for interrupting. I think my  
19 question may be -- I have got the chart that you gave us --

20 THE COURT: Right.

21 MR. ROCHON: -- say Juror No. 8, does the court  
22 anticipate that either acceptable or objection for cause will  
23 be for each one of the jurors, either there is a box acceptable  
24 or checked for cause?

25 THE COURT: Or no box at all.

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1 MR. ROCHON: Therefore, some people simply would be  
2 bypassed that you don't think would be for cause, but they're  
3 being bypassed for other reasons.

4 THE COURT: I am not going to bypass them. If we have  
5 to get to those people, then unless it is obvious to me from  
6 the questionnaire, which that is not going to be a magical  
7 thing, if you say you have a challenge for cause, I would think  
8 that it is going to be fairly obvious to everybody that there  
9 is a basis for a challenge for cause. I am going to ask you  
10 specifically on what question, answer to what question did you  
11 say disqualifies this juror.

12 No, there is no automatic secret challenge for cause.  
13 We will never get to challenges for cause if you give me enough  
14 people that you think both sides think are acceptable for voir  
15 dire. I will tell you, look, the first 10 people in this box  
16 are people you both checked off the box acceptable for voir  
17 dire. You will know that. Then the next eight are people who  
18 have been alternating, that first it was one that the  
19 plaintiffs said was acceptable, the next one was the one that  
20 the defendants said were acceptable. So we have got a  
21 sufficient number and you can choose from there. You know  
22 there is nobody in the box that you didn't say that --

23 MR. ROCHON: Was acceptable.

24 THE COURT: -- was acceptable or that you said that  
25 you had a challenge for cause. Now, I don't know where you

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1 want me to put a person that one side says is acceptable for  
2 voir dire and the other side says it is a challenge for cause.  
3 I guess I would put them in the box and we can fight with  
4 whether or not there is a challenge for cause.

5 Again, that person is going to take the seat of  
6 somebody that you said that you thought was acceptable and they  
7 said that you thought was acceptable, then you would have to  
8 use your preemptory to get rid of that person if I disagree  
9 that there was a challenge for cause.

10 MR. ROCHON: Your Honor, maybe if I could, one of the  
11 things that would cure our concerns is that if we submit ours  
12 ex parte, and plaintiff submits theirs ex parte, once you have  
13 both, I would ask the court to then share with each side the  
14 other's list. I think each side should know what the other has  
15 said.

16 THE COURT: That is fine. The only thing that can do  
17 is complicate things, because I don't know what we could fight  
18 about at that point. I don't know what difference it makes.  
19 It is not going to affect whether or not you are going to  
20 choose among the first 18. You only have three peremptories.

21 That is what I am trying to understand now. If there  
22 are 18 people in the box who you both said are acceptable, what  
23 is the point of wasting time debating about who you said you  
24 would have challenged if they were in the box? I don't  
25 understand the point of spending time on it.



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1 I don't have any problem sharing it with you. Maybe  
2 there is something you think that you can read the mind of the  
3 other side that is relevant to the case by seeing who they  
4 checked off. If you want me to, I don't have any problems with  
5 that. I just want to know that we buy into the process that I  
6 am trying to put to you in a situation where, when you look at  
7 those people in the box, you are going to say yes, those are  
8 the people that I said I want to choose from.

9 MR. ROCHON: Right.

10 THE COURT: You will know that those are also the  
11 people that the other side said they want to choose from. Then  
12 all you have to do is exercise your peremptories after we have  
13 some more general inquiry of those individuals.

14 MR. ROCHON: Your Honor, I still would ask that you  
15 share with each side the list after they're given to you ex  
16 parte. In other words, I don't want to have people gaining the  
17 system to time. Not that Mr. Yalowitz would. If ours was  
18 late, I wouldn't want him to say that we were gaining him.

19 Having done that, your Honor -- for example, I'll give  
20 you a concern. This is where this comes from. I am not  
21 accusing plaintiffs of anything. I have never tried a case  
22 with you or plaintiffs. It is all new to me. If for some  
23 reason their list, for instance, has excluded everyone who is  
24 under 40 as acceptable and age is not a permissible basis upon  
25 which to exclude people from service, our list doesn't do that,

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1 and we have not excluded people solely on the basis of age or  
2 national origin or race. I am not saying they would do this,  
3 but what would happen then is our acceptables would intercept  
4 with them.

5 THE COURT: Right.

6 MR. ROCHON: But they would have, in that instance,  
7 excluded people from that simply by virtue of a characteristic,  
8 which may not be acceptable. The only way to know that  
9 happened is to see what they submitted. If it gives me a  
10 concern, I'll raise it. I doubt it will happen with these  
11 counsel, this case, and this court.

12 THE COURT: I don't have any problems with that. The  
13 reality of what you discuss is technically not what you're  
14 entitled to. What you're entitled to is a fair and impartial  
15 jury. If I say to you I am giving you 30 people that you both  
16 said should be what you wanted to voir dire, I don't know what  
17 basis you have to complain that they struck somebody else.

18 MR. ROCHON: Right.

19 MR. YALOWITZ: Your Honor --

20 THE COURT: Again, as I say, what it does, it only  
21 makes it more difficult for you, because now you are going to  
22 have to exercise your peremptories. I mean, the only other  
23 process, if you say that we should go through each juror one by  
24 one and see if there is a valid challenge for cause and if  
25 there is no valid challenge for cause, that is the person that

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1 you're going to seat one, regardless of whether or not you  
2 checked off both, checked off seat number two as being a  
3 certain person that you both said was acceptable, then you take  
4 the risk that I am going to seat five people that they said  
5 they wanted and five people who you never checked off that you  
6 wanted. Why would you want that?

7 MR. YALOWITZ: Your Honor --

8 THE COURT: Wait. Wait a minute. Just let him finish  
9 his thought. I will come to you.

10 MR. ROCHON: Your Honor, the only thing I ask for is  
11 we eventually see each side's list. Then if there is an issue,  
12 we can raise it. I really don't anticipate one.

13 In response your question, you are entitled to a fair  
14 and impartial, also a random selection of a jury or a fair  
15 cross section. We want to make sure that there is nothing that  
16 impedes that.

17 MR. YALOWITZ: Your Honor, I was rising with  
18 trepidation to agree with Mr. Rochon that if he wants to see  
19 the lists after they have been submitted sometime between  
20 Friday evening and Tuesday morning, that solves his worry, I  
21 don't have a problem with it. I hate to agree with him on  
22 anything.

23 THE COURT: I am sure as we move along, you will end  
24 up agreeing more and more, and probably against me.

25 The only thing that I need is I need a buy-in to the

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1 process. If I don't have a buy-in to the process, then I can  
2 scrap it and at whatever the mercy is of who shows up in the  
3 box, even though you both had a preference for someone else.

4 MR. ROCHON: I accept the process with that  
5 modification.

6 THE COURT: That's fine. Then we can do that.

7 Because, as I say, you will see exactly what I have  
8 done. You will see that if I have -- I may do 20 or 30 at  
9 least. If I have 30 people that you both checked off as  
10 acceptable for voir dire and neither one of you said that you  
11 thought that was a challenge for cause or hesitated in any way  
12 by not checking a box, I guess you could always try to outsmart  
13 the other by not checking any box. That would not necessarily  
14 be to your advantage. Then I would have to fall back to the  
15 process of simply alternating and not giving you the people  
16 that you say this looks like a good juror.

17 I want the people that both sides say from the  
18 questionnaire, this looks like a good juror. I think you would  
19 both want that, because otherwise it goes from the random  
20 selection to a haphazard possibility that you may get people  
21 that you really didn't want, and there is a person sitting  
22 right next to them that you both said you wanted that I  
23 excluded simply because you said you didn't have an opportunity  
24 to manipulate the process.

25 I will do that. Hopefully, if you give me enough

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1 people that you both think from the questionnaires looked like  
2 there is no real challenge for cause or that person's profile  
3 is not somebody you have a preference against, then just let me  
4 know. To the extent that you both think this person might be a  
5 fair and impartial juror, that person will be randomly in that  
6 box in the order in which they were randomly given numbers.  
7 The only thing that affects that order is your preference, your  
8 joint preference. I don't see that as a constitutional issue.

9 MR. YALOWITZ: Your Honor, could we come back to the  
10 jury questionnaire for a moment?

11 THE COURT: Sure.

12 MR. YALOWITZ: I haven't looked at it yet myself. My  
13 colleagues have glanced at it, and it occurs to me both sides  
14 asked the court to include in additional questions. We saw  
15 some of the questions the defendants requested and that the  
16 court included. We don't have to do it right now. If there  
17 was an oversight on the court's part with regard to the  
18 questions plaintiffs requests which were in there, I would just  
19 ask that the court take a second look at that.

20 THE COURT: I can tell you that I don't believe there  
21 was an oversight. I looked very carefully at it. I can tell  
22 you specifically what my reaction was.

23 MR. YALOWITZ: I don't want to relitigate it with your  
24 Honor. There has been just such a flurry of paper, I just want  
25 to make sure we are making volitional decisions.

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1 THE COURT: I will go off the December 31 letter.  
2 Under 1A, your first bullet point, I agreed with you that I was  
3 not going to insert religion into the question.

4 MR. YALOWITZ: Great.

5 THE COURT: I think community groups and all the other  
6 categories are appropriate for them to check off, if it happens  
7 to be a significant portion of their life is dedicated to  
8 organized activity --

9 MR. YALOWITZ: I agree.

10 THE COURT: -- that is of a religious nature. I don't  
11 want to imply that religion has anything to do with this case.

12 MR. YALOWITZ: I couldn't agree more.

13 THE COURT: I agree with you. I did not insert  
14 religion into those questions. I agreed with the defense with  
15 regard to the asking questions about knowledge and feelings  
16 about the PA and PLO. I agreed that also, with regard to the  
17 names of the individuals, officials, public officials, and  
18 entities that were added as a question and ask them whether  
19 that affects them.

20 MR. YALOWITZ: I was really more thinking about  
21 section B.

22 THE COURT: Right. I just don't remember from your  
23 letter what 45A was. There was an objection to 45A. I think I  
24 addressed it. I have it here in my handwriting overruled with  
25 regard to the objection. I don't remember specifically which

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1 question it was.

2 You didn't object to 46A. That puts the language in  
3 there. Again, the language is not exactly as you have asked,  
4 but it is more consistent with the way I usually ask those  
5 types of questions and more consistent with the way questions  
6 are asked, similar questions are asked, which I keep the  
7 language consistent.

8 I did put in the question with regard to terrorist  
9 acts. I put in a general question with regard to terrorist  
10 acts. I think the question had to do with whether or not they  
11 knew anyone who was a victim of terrorist acts. I gave that a  
12 general question. Then I modified the question with regard to  
13 Israel, the West Bank and the Gaza Strip by saying: Do you  
14 know of anyone who was injured or killed, period, and let them  
15 explain.

16 MR. YALOWITZ: You went with the broader questions.

17 THE COURT: I went with the broader questions. If  
18 they were killed as a soldier, they could write that down, if  
19 that is what you're interested in. I think that is a more  
20 neutral way to ask the question to get information.

21 With regard to the ones you asked for, I don't think  
22 it is appropriate to ask them whether or not someone who  
23 commits a serious crime should perpetrate as childhood to be a  
24 factor in determining the innocence or guilt. I don't know why  
25 this plays a part in this case. No one is going to offer such

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1 evidence. Nobody is going to make such an argument. In an  
2 attempt to, I am going to tell the jury that has absolutely any  
3 place here. I am not going to make that decision.

4 MR. YALOWITZ: I agree with that. It is more a  
5 question designed at understanding how people think about the  
6 world, it is not a question designed towards the case. It is a  
7 question that gets at how do you think about things. It is  
8 really more designed to help us understand a person in a way  
9 that may be different from --

10 THE COURT: The other problem I have with this, this  
11 is not a criminal case. I don't want to imply that this is  
12 one. This is a civil case. I made clear that this was a civil  
13 case. I put in language that this was a civil case involving  
14 liability and involving the determination of damages. I want  
15 them to understand that, so my reaction to that question is  
16 that its a bigger danger that that could prejudice a juror  
17 rather than elicit any valuable information that would indicate  
18 that they're somehow unqualified.

19 MR. YALOWITZ: We accept that ruling. That's fine.

20 THE COURT: Quite frankly, I have never had to ask any  
21 juror in a civil case whether or not they think people who are  
22 injured by the actions of defendants who are liable, whether or  
23 not they think that they should be compensated any money. I  
24 think that is a fairly basic principle. I think jurors accept  
25 that. I think all jurors accept that. I think that my



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1 instructions will be very clear that that is what the law  
2 demands.

3 I agree with you, if somebody were to say that no, I  
4 don't think anybody should be compensated if they are injured,  
5 I guess that person would raise serious questions in my mind  
6 whether that person is qualified to sit in any civil case.

7 MR. YALOWITZ: That is what I am getting at. There  
8 are people out there that have that view. It may be a good  
9 view or bad view, but it is not the view we have in our legal  
10 system. I am looking for that kind of sport juror that that is  
11 his or her view.

12 THE COURT: My position is that I have never had to  
13 ask that question, and sufficient questions, particularly  
14 general questions about whether they can sit as jurors and both  
15 sides into this, that if that is a genuine issue with regard to  
16 a juror, that they will say so. But I have never asked a jury  
17 that because I don't want to imply that there is any question  
18 with regard to that.

19 MR. YALOWITZ: We are in your hands on this, your  
20 Honor. Really, I am happy to go through them, I just didn't  
21 want to make sure that -- I just want to make sure that you had  
22 thought about it. You obviously have. We have got a lot of  
23 ground to cover today.

24 THE COURT: Quickly, I'll just tell you, I think we  
25 have sufficient questions about what they read, any knowledge

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1 about issues in this case, that I don't need to ask them  
2 whether they follow Middle East news and events. I think that  
3 there are plenty of questions that would indicate the extent of  
4 their knowledge and what they read.

5 Also, I don't think it is appropriate to interject a  
6 question that relates specifically to the World Trade Center  
7 being possibly destroyed by western conspiracy and terrorist  
8 attack. This is not the World Trade Center case and I don't  
9 want the jurors to at all feel that that is the starting point  
10 for any issue of this case, something that has to do with the  
11 World Trade Center.

12 I have asked a general question whether or not they  
13 know anybody who has been the victim of or suffered physical  
14 injury or death as a result of a terrorist attack. If they  
15 know somebody in 9/11, most people in New York knows of  
16 somebody who was probably been injured or killed in 9/11.

17 MR. YALOWITZ: Yeah. My 9/11 question is a little  
18 different. I am looking to ferret out cooks. There are cooks  
19 in the world who walk around and say 9/11 was a conspiracy of  
20 the U.S. government and crazy stuff like that.

21 THE COURT: My attitude, in the years I have been  
22 doing this, is the way you ferret out cooks is not to ask them  
23 the direct question, Are you crazy?

24 MR. YALOWITZ: I always deny it.

25 THE COURT: If they knew that, they would tell you.

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1 They wouldn't be crazy.

2 MR. YALOWITZ: I'm ready to move on, your Honor. I  
3 just wanted to touch the base.

4 THE COURT: I wanted you to know what I thinking is.  
5 I think it is helpful to know how I approach the issues.

6 MR. YALOWITZ: Very good.

7 THE COURT: The last thing was I think I had  
8 sufficient questions about the Israeli Palestinian conflict.  
9 If you want to look at those questions again, I don't think we  
10 need additional questions. I think they have a full  
11 opportunity to give us and reveal information about the extent  
12 of their knowledge.

13 I will tell you that, quite frankly, basically, I  
14 decided to add question 61. That's the first place I am going  
15 when I get these questions. If that box is checked no, I have  
16 got a real concern regardless of what else they say. That is  
17 what you really want to know, if they hesitate at all.

18 They can consider whether you still voir dire them and  
19 check off acceptable to voir dire. You can say, look, I don't  
20 want to bother with this. We have plenty of people. Move on  
21 to somebody basically sure to all of us they can be fair to all  
22 parties in this case, consistent with the instructions that I  
23 give them before they even start the questioning. Those are my  
24 thoughts. I did thoroughly review that and the specific  
25 changes that are reflected. I think we can put those issues

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1     aside.

2             This is no particular order. Let me go to the request  
3     for clarification. Usually when I get a request for  
4     clarification, I usually respond yes, I meant exactly what I  
5     said. That is usually the clarification. The bottom line is,  
6     yes, I mean exactly what I said. That it is not a *sua sponte*  
7     order of redaction. It is an order that out-of-court  
8     statements incriminating other individuals are not admissible  
9     against these defendants as statements. It is not consistent  
10    with Williamson. It is not consistent with cases beyond that.  
11    That is my ruling.

12            Now, if you don't want to redact it, fine. You don't  
13    have to redact it. You're not getting that document in  
14    unredacted. It is not a *sua sponte* ruling that you should  
15    redact something. It is a ruling that, no, you're not going to  
16    offer evidence of someone who made a statement out of court  
17    accusing someone of committing a crime, that you want to use  
18    that accusation as evidence that these defendants are liable.  
19    I think we went through that in detail that that was clear.

20            MR. YALOWITZ: May I be heard on that?

21            THE COURT: Yes.

22            MR. YALOWITZ: I want to take the case of count 51 of  
23    the conviction of Ahmed Barghouti. I want to try to be very  
24    clear about why I think that count needs to come in unredacted.  
25    Reason number one, it is a conviction under 803.22.

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1 THE COURT: Okay.

2 MR. YALOWITZ: The conviction includes the plea of  
3 guilt and the indictment.

4 THE COURT: I don't have any disagreement with that.

5 MR. YALOWITZ: That count 51 of the indictment comes  
6 in unredacted.

7 THE COURT: Well, no, it only includes that  
8 information in the indictment whether defendant is  
9 incriminating himself, if you want the substance of what he  
10 said. His plea is not a plea for someone else.

11 MR. YALOWITZ: Understood.

12 THE COURT: It is a plea for himself. It is his  
13 statement that I am guilty of committing acts that you accuse  
14 me of committing criminally.

15 MR. YALOWITZ: Correct. And the act that he was  
16 accused of committing was aiding and abetting Abdullah  
17 Barghouti my giving him a safe house. That is the act he was  
18 committing.

19 THE COURT: The act was aiding and abetting a person  
20 to commit a terrorist act by giving that person a safe house.

21 MR. YALOWITZ: Aiding and abetting a senior Hamas  
22 operative in who blew up the Sbarro Pizza restaurant. I guess  
23 at the end of the day I am asking the jury --

24 THE COURT: The guy's name is not part of the offense.

25 MR. YALOWITZ: Okay.

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1 THE COURT: That is the bottom line. It is not part  
2 of the offense. He is guilty of it regardless of whether it  
3 was Barghouti, Mickey Mouse, whoever.

4 MR. YALOWITZ: Look, at the end of the day, the  
5 indictment says aiding and abetting a senior Hamas operative  
6 who did this particular crime, and then the jury can match it  
7 up. So I am not going to sit here and tell you it kills my  
8 case, but it sure makes them work harder for something  
9 because --

10 THE COURT: Yes, because you want the jury to assume  
11 that that fact is true because it was in the indictment and  
12 because he pled guilty to that indictment. That is not a  
13 proper inference under these circumstances. The only  
14 legitimate inference is that, one, the conviction either by  
15 plea or by trial has established the guilt of this defendant  
16 and this defendant alone, and by accepting the allegations that  
17 they say were the conduct that he was involved in that  
18 constituted the criminal offense, he is admitting that he  
19 committed criminal acts and he is admitting that he committed  
20 the legal criminal acts that they have accused him of.

21 Now, beyond that, to simply say that because they  
22 accused him of doing it with someone else, his plea of guilty  
23 is evidence that the somebody else is also guilty. That is  
24 exactly what Williamson says you don't want to do. That is not  
25 appropriate.

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1 MR. YALOWITZ: Well, let me give you two levels of  
2 answer to that, if I may, your Honor.

3 THE COURT: Yes.

4 MR. YALOWITZ: The first is the thing that Ahmed  
5 Barghouti was accused of and pled guilty of was providing  
6 material support to an individual.

7 THE COURT: Right.

8 MR. YALOWITZ: We are not offering the name of the  
9 individual to prove that he is guilty. We have a separate  
10 conviction of him.

11 THE COURT: Right.

12 MR. YALOWITZ: We are offering it to prove that Ahmed  
13 Barghouti gave material support to this guy. We are going to  
14 give separate evidence --

15 THE COURT: No, because it was irrelevant to his plea.  
16 It was irrelevant to his plea. That's the problem. That he  
17 gave it to this guy has nothing to do with what he pled guilty  
18 to. It didn't make him more or less guilty. He was guilty  
19 because he provided material support to someone and he  
20 acknowledged that. Who it was, it is obvious why you want who  
21 it was.

22 MR. YALOWITZ: Of course.

23 THE COURT: Because you want to point the finger at  
24 the defendants. That is a link to say, because he said they  
25 did it, that you should conclude that they did.

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1 MR. YALOWITZ: No.

2 THE COURT: You can't --

3 MR. YALOWITZ: I am not being clear. So it is a lot  
4 of Barghoutis. Abdullah Barghouti is the bomb maker.

5 THE COURT: I see.

6 MR. YALOWITZ: Ahmed Barghouti is their guy.

7 THE COURT: I understand.

8 MR. YALOWITZ: Their guy comes and says, I helped the  
9 bomb maker.

10 THE COURT: Okay.

11 MR. YALOWITZ: He says that. That is in the redacted  
12 indictment, I helped the bomb maker.

13 THE COURT: Right.

14 MR. YALOWITZ: The jury can link that up. I get that.  
15 It sure is easier for them if we can give the name of the bomb  
16 maker.

17 THE COURT: Why?

18 MR. YALOWITZ: Because then they can link it up more  
19 easily.

20 THE COURT: Link what up? I don't understand how that  
21 is somehow more probative than prejudicial, if he has already  
22 admitted that he helped the bomb maker. You already even have,  
23 I assume, independent evidence of who the bomb maker was.

24 MR. YALOWITZ: We do. The jury can link it up.

25 THE COURT: So how is that not just cumulative?



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1 MR. YALOWITZ: It is not just cumulative. It is  
2 really going to help -- I think if you look at the statements,  
3 it is really going to help the jury --

4 THE COURT: The only prompt that I would reconsider is  
5 that if it is clearly established by other evidence that  
6 identifies that person.

7 MR. YALOWITZ: Okay.

8 THE COURT: If it is clearly establishes by other  
9 evidence that identifies that person, obviously it is probative  
10 value is slaughtered, but even prejudice is slaughtered. If it  
11 is clear that this is the bomb maker and it is clear that he  
12 says, I helped the bomb maker, it doesn't make a bit of  
13 difference to the jury whether or not they have to make that  
14 connection or whether or not the redacted name says it is the  
15 same guy who the proof shows made the bomb.

16 MR. YALOWITZ: Unredacted sure makes it easier for  
17 them to make the link.

18 THE COURT: For what?

19 MR. YALOWITZ: Now they have got the name. They don't  
20 have to --

21 THE COURT: They can get the name directly from you.

22 MR. YALOWITZ: All right.

23 THE COURT: Then you say, look --

24 MR. YALOWITZ: I suppose they can get it from --

25 THE COURT: -- we have the defendant in the criminal

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1 case admitting that he helped the bomb maker. The other  
2 evidence that we presented to you showed you exactly who that  
3 bomb maker was.

4 MR. YALOWITZ: Right.

5 THE COURT: That bomb maker was X. It is very clear  
6 that he helped. The evidence demonstrates that he helped; not  
7 his out-of-court incriminating statement, but the evidence  
8 indicates that he helped this individual do the bomb. I don't  
9 understand where you say you are missing.

10 MR. YALOWITZ: Look, I think it makes it easier. I  
11 think we have got to take them one at a time.

12 THE COURT: Let's say to the extent that you have  
13 other independent evidence that there is very little legitimate  
14 argument that it is in dispute, the facts have been disputed  
15 before the jury, I don't have any problems with out-of-court  
16 statements that are made that are consistent with in-court  
17 statements. But to the extent that your only evidence or your  
18 primary evidence is someone who at some point in time during  
19 the confession or during a plea also incriminated a third  
20 person who you want to tie to the defendants, that is the basic  
21 rule that precludes offering evidence for that purpose.

22 The only grounds you gave me that it would be  
23 admissible is a statement against interest. The Supreme Court  
24 has made clear that that part of the statement is not against  
25 the interest of the person who was acknowledging his only

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1 responsibility. So you cannot use that to say because it  
2 doesn't have the reliability that evidence has. The other side  
3 doesn't let you test the reliability by having somebody in  
4 court come and make that accusation.

5 MR. YALOWITZ: Let me say why I agree with the general  
6 statement you made, but disagree with it as applied to a few  
7 pieces of evidence in this case.

8 Obviously, the general statement is correct. If a guy  
9 sits there and says, you know, Marwan brought -- if the guy  
10 sits there and says Joe brought Sam to a safe house, what does  
11 that have to do with the declarant? It is not against  
12 interest.

13 But the Supreme Court says, if the declarant now says,  
14 Joe and I brought the guy to a safe house, that is Williamson.  
15 They say if Joe and I -- I forget the guys -- but Joe and I  
16 brought Sam to Bill's house or something, and it is clear that  
17 Sam and Joe and Bill are all criminals, it is self-inculpatory  
18 and the whole thing is self-inculpatory.

19 Now, in a joint trial, you have got Bruton issues, so  
20 you redact the names because you have got confrontation clause  
21 issues. We don't have confrontation clause issues in this  
22 case. Williamson says Sam and I brought Joe to this place.  
23 That is self-inculpatory and the names Sam and Joe come in, at  
24 least they're not hearsay.

25 THE COURT: Against Sam or Joe?

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1 MR. YALOWITZ: They can't come in against Sam or Joe  
2 because of confrontation clause issues. We don't have  
3 confrontation clause issues in this case.

4 THE COURT: I think you're stretching that example  
5 given by the Supreme Court in the case to a point that it  
6 conflicts with the general principle laid down in that case.  
7 That is not what the Supreme Court meant.

8 The Supreme Court could not have meant that. That is  
9 exactly the opposite of what they specifically said you can't  
10 do. You can't just fold it into a more general statement of  
11 his guilt simply because that is part of the statement. You  
12 have got to give me some reason why that statement has some  
13 relevance, other than the relevance that is cleared that you  
14 want it for here, that you want the jury to conclude that the  
15 defendants were involved because that person who acknowledges  
16 his own guilt said the defendant was involved.

17 MR. YALOWITZ: Here is what I want to do. Maybe this  
18 will work, your Honor. I want to say, thing number one,  
19 Abdullah admits that he was the bomb maker and made the bomb  
20 and he pled guilty to it. There is no question he made the  
21 Sbarro bomb, he made the Hebrew University bomb, he made six  
22 bombs in between. He is the guy who is the bomb maker.

23 THE COURT: Okay.

24 MR. YALOWITZ: That is proof to a fair thee well.

25 THE COURT: Okay.

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1 MR. YALOWITZ: Thing number two, now we have got Ahmed  
2 coming in, and Ahmed says, I helped Abdullah. The first  
3 sentence is like Marwan and I brought Abdullah to the safe  
4 house --

5 THE COURT: Right.

6 MR. YALOWITZ: -- which is like exactly what the  
7 Supreme Court was saying, Joe and I brought Sam, whatever, it  
8 is so close. Then right after that, it says Abdullah was a  
9 senior Hamas operative who made the Sbarro Pizza bomb. In the  
10 context of that statement, there is no doubt Marwan and I  
11 brought him to a safe house is self-inculpatory.

12 THE COURT: As I said, you may be able to convince me  
13 that the redaction is unnecessary if it is clear from the  
14 independent evidence that you otherwise presented that that was  
15 the bomb maker and that that bomb maker had a relationship with  
16 the speaker. If it is only an acknowledgment or a repeat of  
17 the evidence that is independently presented, that is a  
18 different question. I can weigh the prejudicial value against  
19 the potential prejudice.

20 Quite frankly, there is very little potential  
21 prejudice, but less probative value too. There is very little  
22 potential prejudice in them arguing that, even though there is  
23 not much genuine evidence about the dispute of the evidence  
24 that he is the bomb maker.

25 I have admitted the statement that, I helped the bomb

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1 maker. That somehow is great prejudice by having that person  
2 identify the bomb maker that has already been independently  
3 demonstrated, but that is not most of your situations here.  
4 Most of your situations here is that I did it and this PA or  
5 PLO person did it too. That is in conflict.

6 MR. YALOWITZ: There is one situation that you  
7 described that I think which is the Abu Talal situation where  
8 the confesser said, Abu Talal and Wafa Idris and I sat together  
9 and discussed Wafa Idris' suicide mission. That, again, in my  
10 mind is like Joe and Sam -- Joe and I took the gun to Sam's  
11 house. There is no dispute.

12 THE COURT: The purpose is what you're offering. Your  
13 problem is the purpose you want to offer it, it must be true  
14 because he said that this person must have been there because  
15 he said it. You have double and triple layers of hearsay that  
16 you're trying to present that evidence through. You can't  
17 present it for that purpose that way. You can't simply say, I  
18 have proved that he was there because somebody said so when  
19 they were in an interrogation several years ago or when they  
20 pled guilty.

21 MR. YALOWITZ: He didn't plead guilty. He was  
22 convicted. It is part of the conviction. It is not a guilty  
23 plea, it is part of the conviction based on evidence presented  
24 at trial and the finding of fact concluded it was true.

25 THE COURT: But part of the problem that you have in

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1 that regard is that that is not the direct statement even by  
2 that witness.

3 MR. YALOWITZ: It is. It was admitted with his  
4 permission.

5 THE COURT: No, no, no. He acknowledged the  
6 indictment. He did not say out of his own mouth those words  
7 that you have in the indictment. He did not say that.

8 MR. YALOWITZ: It is not --

9 THE COURT: You have a double stretch that you want to  
10 say that because he says I am guilty as alleged against me in  
11 the indictment that that is somehow a statement against his own  
12 interest by him of every word that is in the indictment.

13 MR. YALOWITZ: He didn't plead, your Honor.

14 THE COURT: I am saying it makes it even worse. Then  
15 it is not a statement against his own interest. He didn't make  
16 the statement, somebody else made the statement.

17 MR. YALOWITZ: Your Honor.

18 THE COURT: He didn't personally acknowledge that  
19 particular statement. He said, okay, I am not saying I didn't  
20 do it the things that you said in the indictment, I am not  
21 pleading guilty.

22 MR. YALOWITZ: He didn't do that either. His defense  
23 was, he said, I admit what I said in my confession is true. I  
24 admit that's true, but as a legal matter, I shouldn't be held  
25 liable for that.

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1 THE COURT: Except that I don't remember that being  
2 his statement, the way you just characterized it; I admit what  
3 I said in my confession is true. I don't think he used those  
4 words.

5 MR. YALOWITZ: We have to go back and check. You  
6 could be right, your Honor. My point is a little different  
7 one. You could be right. I don't want to quibble with you.

8 Those custodial statements were admitted in evidence  
9 against the defendant without objection from the defendant.

10 THE COURT: Right.

11 MR. YALOWITZ: Then the defendant said, my argument is  
12 that with the facts in the record, I should be legally excused  
13 from liability and the court should issue a decision in which  
14 it said, these are the facts. He sat together with Abu Talal,  
15 who was the handler of Wafa Idris, and they discussed a suicide  
16 mission. Then this whole case went up on appeal and, again,  
17 the appeals court reiterated all those facts.

18 THE COURT: That wouldn't be admissible in a U.S.  
19 court. It may be admissible in an Israeli court. That is not  
20 the way it works. They can't simply say it is a fact. They  
21 say it is a fact because they got that from somebody else out  
22 of court.

23 MR. YALOWITZ: It was admitted in evidence.

24 THE COURT: You don't have the person here to testify  
25 as to any of those facts.



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1 MR. YALOWITZ: The facts were found by a court based  
2 on evidence that was admitted in evidence in that court on the  
3 consent of the defendant. I think they come in under 803.22.  
4 I think they come in as self-inculpatory statements. Surely,  
5 at a minimum, they come in for notice, because when you have a  
6 senior intelligence officer who is publicly accused of  
7 organizing a terror attack and you don't investigate it and you  
8 just keep him on the payroll and give him promotions, then at  
9 least I can argue to the jury, look, we aren't offering it for  
10 the truth, if you don't let me offer it for a truth, you were  
11 an intelligence agent, you are supposed to check up on your  
12 paper.

13 THE COURT: I don't have any problems with that, if  
14 you have a witness you can put on the stand and that witness is  
15 going to say, yeah, I had notice of this and despite knowing  
16 this, I did X. Then bring that witness.

17 MR. YALOWITZ: I don't have their witnesses.

18 THE COURT: That's your witness, not their witness.  
19 You said you want to present evidence that they were on notice.  
20 If you have evidence that somebody is going to say that they  
21 were on notice, or if you have evidence that somebody is going  
22 to say, I told them, then bring that person in.

23 MR. YALOWITZ: All right.

24 THE COURT: That's a different question. I understand  
25 the hurdle on this issue that you have to overcome, but it

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1 doesn't change the rules. The rules are that you have to have  
2 some direct testimony of someone who can be cross-examined  
3 under oath that certain events happened. It has to be  
4 firsthand knowledge, not hearsay, or it has to be some  
5 exception to the rule. You acknowledge that this is not  
6 firsthand knowledge and not hearsay.

7 MR. YALOWITZ: I think it is a self-inculpatory  
8 statement.

9 THE COURT: You are saying there is an exception to  
10 the rule that applies even though it is not a statement by a  
11 witness under oath in the courtroom.

12 MR. YALOWITZ: Correct.

13 THE COURT: It is admissible otherwise because it is a  
14 statement against interest.

15 MR. YALOWITZ: Correct. I would like to offer it for  
16 the truth. If I can't offer it for the truth, I have other  
17 tools at my disposal in my tool kit. I can offer it for  
18 notice, I can offer it --

19 THE COURT: Whatever evidence that you have, whatever  
20 witness that you will call who will say that is an agent or  
21 employee of the defendants who said I had notice or someone who  
22 will get on the stand and say I gave them notice, you can call  
23 that witness.

24 MR. YALOWITZ: Or as an intelligence agency, they  
25 should be expected to --

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1 THE COURT: No, no, no. That doesn't work. I would  
2 expect the CIA to know a whole lot, but they didn't stop 9/11.  
3 As an intelligence agency, I don't know what they are supposed  
4 to know. I don't know how good, how bad --

5 MR. YALOWITZ: We have experts who can say --

6 THE COURT: You have been given appropriate leeway to  
7 utilize the documents that were in their possession which  
8 either reflect what they knew at the time or doesn't reflect  
9 what they didn't know or in hindsight reflects what they knew.  
10 If you have such documents that reflect that knowledge, that  
11 shows that they possess that knowledge, or you have some  
12 witness employed by them who says they have that knowledge, you  
13 have some witness to say, I gave them that knowledge, you can  
14 call them.

15 Otherwise, I think the situation you are in is you  
16 want inference upon inference that somehow, because of the  
17 proceedings that were going on, criminal proceedings, that they  
18 should have known that --

19 MR. YALOWITZ: It is not just that they should have  
20 known. They had a practice of paying the lawyers for these  
21 individuals, and they have record after record of the lawyers  
22 coming back to intelligence headquarters and saying, here is  
23 what happened.

24 THE COURT: Okay.

25 MR. YALOWITZ: When we ask them for the records on

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1 this guy Abu Talal, they gave me two skinny reports and  
2 withheld the rest. You and I talked about that issue. You  
3 overruled my objection, and I am living with that.

4 THE COURT: My recollection is not that I said that  
5 they had the right to withhold. Is that what you're saying I  
6 said?

7 MR. YALOWITZ: No.

8 THE COURT: I thought they said they gave you  
9 everything they had. That's my recollection.

10 MR. YALOWITZ: They didn't. They never said they gave  
11 me everything they had.

12 THE COURT: I don't have a recollection of you arguing  
13 to me that they had further documents in their possession and  
14 they refused to give them to you and I would not order them to  
15 turn them over.

16 MR. YALOWITZ: Well, no, it is in between.

17 THE COURT: Right.

18 MR. YALOWITZ: As is so often the case, it is in  
19 between. I said there are a lot of documents missing that are  
20 referred to in the documents.

21 THE COURT: Right.

22 MR. YALOWITZ: You say the report of X and you didn't  
23 give me the report of X. I said did you conduct a search.  
24 Mr. Hill refused to answer my question. I said if you didn't,  
25 if you don't answer my questions, I am going to assume you

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1 didn't conduct an adequate search. He will refuse to answer my  
2 question.

3 So then I come to Judge Ellis. I say, look, there is  
4 missing documents and particularly this guy Abu Talal, one  
5 thing we know is he conducted military activities, they have a  
6 document that says that, there is more information in the other  
7 office. They have a document that says that. They don't give  
8 us the information. We ask to take a deposition of the guy who  
9 did the search, we got shut down on that.

10 It is obvious what happened to me here is they did a  
11 desultory search, they didn't look for the records on this key  
12 guy, and I have a pattern in which the lawyers, the criminal  
13 defense lawyers, come back to the intelligence service and tell  
14 them exactly what is going on. And yet there is no record on  
15 this key intelligence guy because they didn't look for it. I  
16 think I have enough to go to the jury based on that.

17 THE COURT: If you want to demonstrate that the  
18 records that you have are incomplete and that there is  
19 something missing, because you want to argue that either it has  
20 been hidden, destroyed, whatever you think your theory is of  
21 why it is missing --

22 MR. YALOWITZ: Right.

23 THE COURT: -- then you bring in the appropriate  
24 witnesses and you let them give the appropriate testimony. But  
25 at this point, that is not the issue that I am addressing now.

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1 MR. YALOWITZ: It is a piece of the inference that I  
2 need. We have public information that the guy was implicated  
3 as the master mind of the most infamous suicide bombing  
4 organized by the Al Aqsa Martyrs Brigades. The most  
5 significant one, publicly identified.

6 We have a pattern in which the lawyers go back to  
7 headquarters and say, this is what is being told to the  
8 interrogators. We have missing documents about this guy. And  
9 when we give an interrogatory saying, who is this guy publicly  
10 identified, they say, well, the guy that is being identified is  
11 Kamel Al Ahmed, identification number such and such, but we  
12 have no idea whether he did it or not.

13 THE COURT: I am not sure what issue we are addressing  
14 at this point.

15 MR. YALOWITZ: Whether I can give the name.

16 THE COURT: What does that have to do with whether you  
17 can give the name? I don't understand how that advances that  
18 argument one bit.

19 MR. YALOWITZ: As a piece of the notice puzzle, the  
20 fact that he was publicly identified is relevant. If you're  
21 not going to admit it for the truth, it is relevant to the  
22 inference that the jury is entitled to draw that the defendants  
23 were on notice that he was involved and they didn't investigate  
24 it and they kept him on the payroll.

25 THE COURT: Unless you have something that equates to

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1 actual notice, then my ruling is that what you want to  
2 accomplish, the probative value is outweighed by the potential  
3 prejudice because there is a greater danger that the jury is  
4 going to accept this as true, simply because someone said it  
5 out of court, than there is that they are supposed to draw  
6 inference upon inference that because it was in the public  
7 domains, someone relevant to this case must have known about  
8 it. That's a bigger leap.

9 If you have some direct evidence there is some  
10 knowledge of this, you want to establish that with witnesses,  
11 that's fine. But no, you're not going to back door it at that  
12 point to get this evidence in when it is clearly evidence that  
13 is not admissible.

14 MR. YALOWITZ: The other thing that happened here,  
15 your Honor -- I don't want to leave this point. I am afraid  
16 that if we don't make this link, we still have the material  
17 support, but it is not the vicarious liability, which is I  
18 think the much more natural case here given the role of the  
19 guy.

20 The other thing is, before I came on the case, my  
21 predecessors requested Hague assistance to take the deposition  
22 of Nuwar and all these other guys, and the defendants opposed  
23 it. So the guy is unavailable to me and always was  
24 unavailable. So to get whip-sawed, where you can't go take his  
25 deposition and ask him about it, and then you can't get in his

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1 self-inculpatory statement which sounds a lot like saying, Sam  
2 and I took the gun to Joe's house, you know, I mean, there is a  
3 real issue of procedural fairness here.

4 THE COURT: As I say, the only argument you made  
5 originally was that it was a statement against interest, penal  
6 interest. I am ruling that the statements that you want to use  
7 and the purpose for which you want to use them do not qualify  
8 under the rules of statement against penal interest.

9 I don't see any other basis that you demonstrated that  
10 those documents that don't have the reliability of the  
11 statement against penal interest, because they don't qualify  
12 that they should be offered for the purpose that you want to  
13 offer it and for the truth of the statements that were made out  
14 of court. That is my ruling on that.

15 Now, you are going to have to address either today or  
16 I suggest when we meet again on Monday, you have to address  
17 today or Monday, whether or not you genuinely, in response to  
18 their renewed summary judgment motion, whether you genuinely  
19 have without that proof with regard to each of the claims. To  
20 the extent you don't have other independent proof of those  
21 claims, then the case is not going to go to the jury. That is  
22 just the rule.

23 I understand why this is important to you, because a  
24 couple of the issues they claim that is your only evidence that  
25 they have any connection to this. If that evidence doesn't



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1 come in, you have absolutely no other evidence of which a  
2 reasonable jury could conclude that they were connected to  
3 this. If you can't articulate you do have some other evidence,  
4 then either I am going to preclude you from moving forward or  
5 grant them summary judgment or give a directed verdict on that,  
6 if the evidence is not going to come in.

7 MR. YALOWITZ: Look, obviously on the Abdullah  
8 Barghouti, Ahmed Barghouti story, I am not concerned about  
9 that, based on our conversation.

10 The Wafa Idris story, if you are not going to let me  
11 put the name of Abu Talal in front of the jury, that is a  
12 significant hurdle to me.

13 THE COURT: I understand that. I am not going to let  
14 you put in that the evidence against him is an accusation by  
15 another person made out of court during the confession.

16 MR. YALOWITZ: If you are not going to let me put it  
17 in as a self-inculpatory statement and you are not going to let  
18 me put it in as a conviction and you are not going to let me --

19 THE COURT: It is not a conviction against them. Your  
20 problem is, if it doesn't qualify as a statement against  
21 interest, the issue with regard to the conviction is whether or  
22 not the only thing you are proving by the conviction is what  
23 that person was convicted of. You can't prove the case against  
24 somebody else based that on conviction.

25 MR. YALOWITZ: What he was convicted of was

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1 conspiring -- he was an informant for the intelligence service.  
2 He was convicted of conspiring with somebody who worked for the  
3 intelligence service whose name is redacted and Wafa Idris, who  
4 everybody agrees was the suicide bomber. I assume I don't have  
5 to redact her name. Everybody agrees she was the suicide  
6 bomber.

7 THE COURT: Right, I understand.

8 THE VIDEOGRAPHER: So he was convicted of conspiring  
9 with her and a guy in the general intelligence service.

10 THE COURT: Okay.

11 MR. YALOWITZ: I gave an interrogatory to the  
12 defendants saying, who is this guy that was identified as the  
13 conspirator? They said, well, we know who the guy is, we are  
14 not admitting he was the conspirator. We just don't know.  
15 That, to me, seems like a pretty significant omission --

16 THE COURT: What does that have to do with the  
17 conviction, the admissibility of the conviction?

18 MR. YALOWITZ: No, I'm sorry. I am just thinking out  
19 loud about the summary judgment issue that your Honor raised.  
20 I am saying, I think I understand your inclination on the  
21 redacting of the name. I think I have enough to go on if the  
22 name is redacted, as long as it is clear that it is the same  
23 guy.

24 THE COURT: I don't know how you're going to establish  
25 it is the same guy. You may or may not. I don't know.

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1 MR. YALOWITZ: Because the conviction will say Mr. X  
2 and then the interrogatory says who is Mr. X? They say Mr. X  
3 is, you know, this person and we have no idea whether he did it  
4 or not.

5 THE COURT: Okay.

6 MR. YALOWITZ: If I have that, I think it is  
7 reasonable for the jury to say, you have a responsibility to  
8 know whether your employees are engaged in conspiring to send  
9 suicide bombers. If you turn a blind eye to that, you can be  
10 responsible. I think even without getting the name in, I don't  
11 have a problem with this second renewed supplemental summary  
12 judgment.

13 THE COURT: Have you responded to that?

14 MR. YALOWITZ: Your Honor, we have been so buried in  
15 paper, we have not responded.

16 THE COURT: You have been buried in paper? I have got  
17 twice as much as you have got. My only question is, are you --

18 MR. YALOWITZ: I have not responded to it. Frankly, I  
19 did not intend to.

20 THE COURT: That's what I was going to ask. Am I  
21 supposed to be waiting for any further response on this?

22 MR. YALOWITZ: If you are going to grant it, then I  
23 need to respond.

24 THE COURT: I don't know if I am going to grant that.  
25 I don't know. I have to look at it more carefully. As I say,

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1 to the extent that you cannot articulate for me how you intend  
2 to prove those facts without that evidence, I am going to grant  
3 it. If you can articulate a reasonable basis on which you  
4 believe you will attempt to, and that a reasonable jury could  
5 conclude based on direct or circumstantial evidence or other  
6 reasonable inference the claims that you have, that they say  
7 you're no longer viable because of the rulings, then I am going  
8 to let you go forward.

9 That is the only thing. If you want to respond at  
10 all, I just need for you to articulate for me, without those  
11 statements, out-of-court statements, what is your proof? If  
12 you can't give me any proof, I am not going to waste any time  
13 on it.

14 MR. YALOWITZ: Look, I agree with that.

15 THE COURT: If you can articulate some proof, then I  
16 will at least consider whether or not you should be able to go  
17 forward on that basis and let the jury make that determination.

18 MR. YALOWITZ: Why don't we do this, why don't I  
19 respond by a letter?

20 THE COURT: That would be fine.

21 MR. YALOWITZ: Without a formal thing, I will say my  
22 request will be that you deny the motion without briefing.

23 THE COURT: Right.

24 MR. YALOWITZ: I will summarize what the evidence  
25 looks like based on the -- I think really what we are talking

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1 about is the Idris case, because the Abdullah Barghouti case,  
2 it is clear.

3 THE COURT: I tried to make it sharp. To the extent  
4 they're now renewing their motion as to all of those  
5 plaintiffs, you should at least say something why there is  
6 still sufficient evidence in this case, despite those rulings,  
7 to go to a legitimate --

8 MR. YALOWITZ: I will try to --

9 THE COURT: That's all I need. I just need a  
10 paragraph.

11 MR. YALOWITZ: I'll try to get you that on Friday. We  
12 are working around the clock here.

13 THE COURT: So am I.

14 MR. YALOWITZ: It is part of the tactic here, you  
15 know.

16 THE COURT: I want to resolve this on Monday. Try to  
17 get it to me before Friday, if you can. Try to get it to me.

18 MR. YALOWITZ: I am otherwise occupied the next two  
19 days, as you know.

20 THE COURT: Let's just go past that.

21 MR. YALOWITZ: Thank you.

22 THE COURT: There are a couple of smaller things.

23 Yes, sir. You want to talk me out of it?

24 MR. ROCHON: No. It is just that yesterday, you may  
25 have noticed that plaintiffs have indicated that as to another

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1 incident, the Guetta incident, that they are not going to be  
2 relying on the identifications.

3 THE COURT: Yes, the photo.

4 MR. YALOWITZ: We will address that case in the  
5 letter. We are fine on that.

6 THE COURT: The photo is no longer going to be  
7 evidence?

8 MR. YALOWITZ: I am not offering the ID. I will  
9 include that in the letter.

10 THE COURT: All right.

11 MR. ROCHON: That's all I have.

12 THE COURT: I thought you were clear about that. You  
13 don't have to waste time on that.

14 MR. ROCHON: What I was rising to say is that it seems  
15 like that was the main evidence of any liability Mr. Yalowitz  
16 is going to address in his letter, and I appreciate him doing  
17 so.

18 THE COURT: Yes, that will be important.

19 Let me just quickly --

20 MR. YALOWITZ: Your Honor, my colleagues want me to be  
21 really clear, because this redaction project is an enormous,  
22 logistical undertaking. The names of the suicide bombers do  
23 not have to be redacted, have I got that right?

24 THE COURT: I don't have any problems if there is  
25 independent evidence of who the suicide bombers are and that

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1 you are not relying on these statements as evidence of the  
2 suicide bombers. I don't see that to be the issue.

3 MR. YALOWITZ: Thank you. I just want to be crystal  
4 clear on that.

5 THE COURT: I can only say that, in the abstract,  
6 because I don't know if the defense is going to genuinely try  
7 to dispute the other evidence that you intend to offer as to  
8 who the bombers, suicide bombers.

9 MR. HILL: All I would ask, your Honor, is that the  
10 plaintiffs, if they want to do that, identify the other  
11 admissible evidence that they are claiming would establish that  
12 fact. Because there is a lot of evidence. They have thousands  
13 of trial evidence that they are trying to --

14 THE COURT: I am going to do it this way. If you  
15 genuinely are going to dispute who committed the bombing or who  
16 committed the act, then you should say so. To the extent that  
17 you all know who the individuals were who have been held  
18 responsible for personally being involved in those acts --

19 MR. HILL: Let me consult with my colleague about it.

20 THE COURT: You may want to talk to them. I think we  
21 are pretty much talking about the guys on the scene or the guys  
22 where there is no evidence or contention that they personally  
23 were employed or otherwise an agent, direct agent being  
24 directed by the PLO or the PA.

25 MR. YALOWITZ: The other name, your Honor, that we

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1 would like to not have to redact, because it appears so often,  
2 is Yasser Arafat. Nobody is arguing that, you know, Yasser, he  
3 is dead, he has not got any -- but where it says, you know, I  
4 spoke with Arafat, it is not to inculcate him, it is to deal  
5 with their approval knowledge.

6 THE COURT: I am not sure if that is an issue.

7 MR. ROCHON: I think it might be an issue. It depends  
8 on the document. We have so many, we have to kind of work  
9 through today, hopefully, the plaintiff's exhibit list, which  
10 has now shrunk since our previous hearing.

11 Once we are through that and know what they're  
12 actually going to be allowed to admit and we can address it, I  
13 might recommend to plaintiffs, not that they need to take my  
14 advice, we might talk about whether exhibits are getting in,  
15 whether they deal with whether or not they are redacted.

16 THE COURT: Okay. They are not getting in unless they  
17 are redacted. That's my position.

18 MR. ROCHON: Right. They can do it however they want.  
19 As to Yasser Arafat, we think his name appears often. Often  
20 those exhibits may never gain admission. I don't want them to  
21 go through a redaction.

22 MR. YALOWITZ: That is very gracious of Mr. Rochon.

23 THE COURT: That's a waste of time. Do you have a  
24 reason and a legal ground for redacting Yasser Arafat's name in  
25 the document?



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1 MR. ROCHON: I am sure in some exhibits we would. I  
2 bet in many we would not. Therefore, I don't think it can be  
3 discussed in the abstract. My suggestion, it might be better  
4 to first determine which of the 1200 exhibits would come in  
5 before we do that, because there is a lot of random reference  
6 to Yasser Arafat in books and media and all these third-party  
7 sources that may, in our view, never come in. I don't know that  
8 I want to discuss that.

9 THE COURT: I don't know what else we are talking  
10 about in terms of the admissibility. We discussed the  
11 admissibility.

12 MR. ROCHON: I thought we had, too. The defendants  
13 feel that your discussions on admissibility have not rendered  
14 the plaintiff's exhibit list to be less than -- it is still the  
15 same it was with before you gave your indications as to what  
16 would come in.

17 THE COURT: You should have a better idea than they do  
18 what I ruled in and out. That is what we are going to proceed  
19 on. If you think there is something that is prejudicial to  
20 you, unduly prejudicial with regard to Yasser Arafat's name, it  
21 is your responsibility to identify that and your responsibility  
22 to make sure you know whether or not they intend to use it and  
23 whether or not you are going to ask them to ask me to tell them  
24 to redact it if it is going to come in. If you are simply  
25 going to maintain the position that it just should be

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1 inadmissible in and of itself, that's fine.

2 MR. ROCHON: The fact that Yasser Arafat had a  
3 position in the PLO, PA, is obviously not an accusation. It is  
4 simply a statement as to that. We would not be seeking to  
5 redact, I am sure. If there is a statement that Yasser Arafat  
6 did X or provided funds to so-and-so, I imagine made by a third  
7 person, we would seek to redact that.

8 THE COURT: You can assume they are probably going to  
9 seek to try to get it in. You should pull that document out  
10 and let it be known to them and/or to me as quickly as possible  
11 that you want this redacted.

12 MR. ROCHON: We will do that. I think some of this  
13 will be easier once we are through the afternoon session,  
14 whenever the court addresses the other objections to their  
15 exhibits.

16 THE COURT: Let me get past some quicker things.  
17 Let's pass some quick things before lunch, and we can get  
18 through more substantive things.

19 There was a request by the plaintiffs for exclusion of  
20 some information. I will just describe it, rather than  
21 describe it in detail as derogatory information about a  
22 deceased plaintiff. Can I assume that you don't intend to  
23 offer that kind of evidence?

24 MR. HILL: The answer is yes, that count is going to  
25 be dismissed anyway once you get to summary judgment. We don't

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1 intend to raise that issue.

2 MR. YALOWITZ: Well, your Honor, I just want to be  
3 clear, I mean, that is a non-answer.

4 THE COURT: It is not a non-answer. I take it that it  
5 is not coming in, period.

6 MR. YALOWITZ: Thank you, your Honor.

7 THE COURT: All right. With regard to Mark Sokolow's  
8 position relationship to the firm.

9 MR. HILL: Again, that one should be dismissed. It  
10 would only come in if he claims the injuries are preventing him  
11 from working, in which case we can identify that is a partner  
12 of a major law firm.

13 THE COURT: You don't intend to put into this case  
14 that he has a particular relationship with this firm for any  
15 independent purpose.

16 MR. HILL: Not independently of his testimony. If his  
17 testimony would make it relevant where he works today, I  
18 reserve the right to raise that.

19 MR. YALOWITZ: Your Honor, it is the name of the firm  
20 that is of concern to me.

21 THE COURT: I understand. The name of the firm,  
22 they're not saying he is associated with the firm that is  
23 representing the plaintiffs.

24 MR. HILL: If I cross him and say, you are with an Am  
25 Law 100 firm, as opposed to in regards to this particular

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1 firm --

2 THE COURT: My ruling is that will stay out, unless he  
3 opens the door to that. And if he does so, then you will make  
4 an application before me to be able to elicit it and tell me  
5 how you want to elicit it and why it is not appropriate.  
6 Otherwise, I am going to assume that we are not going to  
7 discuss that.

8 MR. HILL: Understood, your Honor.

9 THE COURT: The plaintiff also wanted to add two new  
10 indictments where they say that the defendants, although they  
11 didn't plead guilty, they acknowledge that the indictments, the  
12 truth of the indictments or the facts in the indictment. I  
13 don't have any reason to treat that any differently than a plea  
14 in terms of the nature of what is being said and what is being  
15 used, but the same rule applies with regard to the redactions  
16 and the accusations that you're relying on for the truth, which  
17 are not incriminatory statements.

18 MR. YALOWITZ: Thank you, your Honor.

19 THE COURT: Does the defense want to make a strenuous  
20 argument to that? Let me go past that.

21 MR. HILL: We do have one point on one of those.

22 MR. SATIN: The only issue is there have been  
23 statements of admissions to facts for which the court then  
24 found the person guilty. But the court was clear, we find the  
25 person guilty with respect based on the statements to these

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1 counts in the indictments but not others. It might not have  
2 been. I am not sure exactly.

3 In some cases where there have been so-called guilty  
4 pleas or statements by perpetrators for which a person was  
5 found guilty, the court was clear that it was not finding that  
6 person guilty for everything in the indictment. Obviously, the  
7 only part of the indictment that should be admitted is the part  
8 for which the court found him guilty based on his statements.

9 THE COURT: How many of these such statements,  
10 indictments, are there?

11 MR. SATIN: Total indictments like the one I just  
12 described?

13 THE COURT: Like the one --

14 MR. SATIN: One comes to mind at the moment.

15 THE COURT: You should identify that one or whatever  
16 ones you think fall into that category and see if you can agree  
17 upon an appropriate redaction. If you can agree on appropriate  
18 redaction, let me know. It seems to me, if you are correct as  
19 you have described it, that the defendant has given a general  
20 acknowledgment of his guilt, but the court did not find him  
21 guilty of a particular set of acts, then those set of acts are  
22 not in the indictment or not admissible, unless there is a --  
23 that's why I say I have concerns about just a general, yes, I  
24 agree that I did what you accuse me of generally. If they  
25 found him not guilty of that, that is obviously not a

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1 conviction.

2 MR. SATIN: The only other issue --

3 MR. YALOWITZ: I mean --

4 THE COURT: Do you know which one he is talking about?

5 MR. YALOWITZ: Of course. We will look at what they  
6 want to do. This guy represented himself. He didn't have a  
7 lawyer. He made a lot of statements during the course of the  
8 trial. And one of the things he said was, okay, I sent the  
9 suicide bomber, but I sent him in a taxi. I didn't send him  
10 with this woman, who I believe there is a evidence he had a  
11 personal relationship with the woman. Whatever, he said, I  
12 sent him in the taxi. It is not correct that I recruited this  
13 woman.

14 So then like they stop the trial and the prosector  
15 said, look, he has admitted to doing all the things, and the  
16 court said, all right, based on his statements during trial, we  
17 convict him. And with regard to the count that included  
18 sending, you know, a Mohamed Hashaika suicide bomber, subject  
19 to his statements at that hearing, so it is fine. We can deal  
20 with it.

21 THE COURT: Sounds to me that, on that issue, you have  
22 neither a conviction nor do you have a self-incriminatory  
23 statement.

24 MR. YALOWITZ: On the issue of whether he recruited  
25 that woman? Fine.

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1 THE COURT: Right. If you have neither a conviction  
2 on that issue or self-incriminatory statement, then reference  
3 to those facts in the indictment are not probative.

4 MR. YALOWITZ: It is fine. We can take them out. She  
5 also pled guilty. We can get it in through her. It is not a  
6 problem.

7 THE COURT: I want to make sure. You guys know better  
8 than I.

9 MR. SATIN: The only last thing really quickly on the  
10 redaction issue, I know the court's ruling was related to  
11 involving the attacks at issue in the case. Many of the  
12 indictments involved attacks not at issue in this case. Those  
13 should be redacted in the entirety.

14 MR. YALOWITZ: They should not be redacted in their  
15 entirety, your Honor. It is highly probative of the policy of  
16 the PA that these guys, it is not that they did a one-off, it  
17 is that they were engaged in terror attack after terror attack  
18 and they kept him on the payroll and they gave him promotions.

19 THE COURT: I am not quite sure, other than you are  
20 sort of making a relevance argument, I am not quite sure what  
21 ground you say that that is inadmissible.

22 MR. SATIN: A few things. It would be, one,  
23 relevance. It is not relevant.

24 THE COURT: Other than relevance.

25 MR. SATIN: The prejudice to us based on these other

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1 attacks coming into evidence now. The jury is going to hear  
2 about terrorist attacks, other attacks not at issue in this  
3 case. I also think it is consistent with the law of the case.

4 THE COURT: I am not sure, to the extent that you say  
5 that you're objecting to terrorist attacks committed by other  
6 people, that there is no evidence that the PA or the PLO had  
7 anything to do with it. To the extent that there is evidence  
8 that they were aware that the people that they were  
9 compensating were involved in committing terrorist acts, I find  
10 that to be relevant and admissible. With regard to their  
11 knowledge, their state of mind, what needs to be proven in  
12 terms of their support of terrorist and terrorist acts that has  
13 been alleged in this case.

14 MR. SATIN: Certainly, I think one error we dispute is  
15 this question of PA and PLO awareness of those particular acts.

16 THE COURT: I agree.

17 MR. SATIN: The plaintiffs have made the claim I think  
18 a few times that these were publicly available records. That  
19 is not necessarily the case.

20 THE COURT: Okay.

21 MR. SATIN: These are military court files. Someone  
22 can't walk through and find out this information.

23 THE COURT: All right.

24 MR. SATIN: So that fact that the court is sort of  
25 based its argument on is not, in fact, true.



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1 THE COURT: I am not resolving that fact. Either they  
2 will have evidence, direct or circumstantial, that the PA  
3 and/or the PLO knew and you will have evidence, direct or  
4 circumstantial, that they didn't or the jury is going to  
5 independently resolve that issue.

6 MR. SATIN: Even if --

7 THE COURT: As a general rule, based on the grounds on  
8 which you raise an objection, I do not find that it is  
9 irrelevant. And I do not find that in the abstract, it is  
10 somehow unduly prejudicial if there is evidence that a  
11 reasonable jury could conclude that the people that the  
12 defendants were dealing with and compensating were known to be  
13 involved in the acts of violence. They can assess the  
14 knowledge and the intent, the state of mind of the defendants  
15 with regard to these acts. I think that evidence is relevant.

16 MR. SATIN: Our position is it should be just with the  
17 respect to the attacks at issue in this case, not other  
18 attacks.

19 THE COURT: That is like saying, well, yesterday,  
20 Chase Bank on the corner was robbed. I didn't have anything to  
21 do with it. John Doe robbed the bank, except John Doe robbed  
22 nine other banks and he gave me half the money. You can't say  
23 it is irrelevant that John Doe, that I took half the money when  
24 John Doe robbed nine other banks, because that is not the bank  
25 that is at issue. It is my relationship with this guy and

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1 knowing whether or not he is a bank robber is really what is  
2 relevant.

3 I can't accept that argument in the abstract. If you  
4 can give me, with regard to some specific piece of evidence,  
5 why you say that that doesn't reflect or shouldn't be used to  
6 reflect that there is evidence for the jury to consider that  
7 there was support for this terrorist or this individual or for  
8 this type of activity, then I will hear it.

9 No, I can't give you a carte blanche, as they say,  
10 ruling that no, they can only offer the evidence that you paid  
11 a person to commit one of these terrorist acts if they have  
12 evidence that you paid other people to commit other terrorist  
13 acts. You can't say it is irrelevant. No, I can't accept  
14 that. If we can either deal with it more specifically with  
15 regard to certain exhibits, we will deal with that.

16 I think that takes me into the next issue which is  
17 related to that. The defendants request the exclusion of  
18 testimony about post-attack payments to non-PLO/PA employees.  
19 I disagree, I think that is relevant. Matter of fact, I am not  
20 quite sure, as they say, I don't know how this would play  
21 itself out. You know the witnesses, I don't.

22 I am not sure why that is the objection of the  
23 defendants rather than the objection of the concern of the  
24 plaintiff. I thought your position was that -- I assume you  
25 don't want to present to the jury evidence that the only people

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1 you paid were PLO and PA employees, because if that is your --  
2 I thought your position was you make routine payments to  
3 everybody.

4 Why would you want to exclude the routine payments  
5 that you made to non-PLO employees? If that is what you want  
6 to do, remember, when you talk about precluding evidence, my  
7 ruling is that the evidence doesn't come in, period, from  
8 either side. If I am precluding this evidence, I want to make  
9 sure I understand this. You don't want any evidence before  
10 this jury that the PA or the PLO made payments to non-PA or PLO  
11 employees? You want only evidence that they made payments to  
12 PA and PLO employees? I'm not sure you have thought that out.  
13 Is that what you want?

14 MR. ROCHON: Yes.

15 THE COURT: You are not going to get it. To the  
16 extent that you're making payments to people who you know are  
17 permitting terrorist acts, I think it is your responsibility to  
18 explain why. If a reason is we only give money to people if  
19 they are employed by us, I assume that is not the reason you  
20 are going to give, because that is not the truth.

21 MR. ROCHON: We are not going to give the reason  
22 anymore. You just said those payments are coming in.

23 THE COURT: Look, I don't know. You may convince me.  
24 I just haven't heard the logical argument. If you want to  
25 convince me that I should keep out the fact that any other

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1 payments were made to non-PLO employees, so the record before  
2 this jury when they go in the jury room is that the only people  
3 you made payments to or made other payments to were people who  
4 were PLO employees, then the jury can decide for themselves why  
5 does that make sense.

6 If you have no interest in those terrorist attacks,  
7 why are you only paying people who you know committed terrorist  
8 attacks who are employed by you, not you want to make -- the  
9 problem with making that argument is that we know that is not  
10 true.

11 MR. ROCHON: Right.

12 THE COURT: That's the problem with keeping that out,  
13 because it gives the jury a false impression of what the true  
14 facts are.

15 MR. ROCHON: Right. Our argument is based on whether  
16 that the evidence wasn't relevant unless they were employees  
17 because the court suggested that the evidence was relevant  
18 under the *respondeat superior* theory that the plaintiffs were  
19 presenting. Obviously, if someone is not your employee, you  
20 cannot be liable under *respondeat superior*.

21 THE COURT: I know, but the problem is the question  
22 for the jury -- I have to look at this from the jury's point of  
23 view. The question for them is what would motivate a person to  
24 make a martyr payment? You can give them whatever explanation  
25 that you think is the appropriate explanation, but you can't

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1 give them the explanation that it is only appropriate because  
2 they are employees of the PA, Because that is not true.

3 You paid people who were not employees of the PA that  
4 you had no obligation to pay. Either you did that for one of  
5 two reasons. One, because that was your general policy for  
6 other business and political reasons, or two, because you were  
7 supporting territory. There are only one of two choices.

8 I think the jury is entitled to know what the true  
9 facts are, that martyr payments are made and they're entitled  
10 to argue from that, that the only common denominator is that  
11 these people are terrorists. You have the right to argue, no,  
12 that is not the common denominator. The common denominator is  
13 something else. That's a jury determination. I don't think it  
14 can be excluded on that basis.

15 MS. FERGUSON: Your Honor, if I can focus on one  
16 category of payments. There is a lot of evidence and proffered  
17 expert opinion on this evidence of payment through prisoners  
18 through the administrative detainees. So people who are  
19 employed by the PA are not paid through that system.

20 THE COURT: Okay.

21 MS. FERGUSON: So it is those payments are not  
22 relevant to a *respondeat superior* theory of liability.

23 THE COURT: Well, I don't consider it only relevant to  
24 a *respondeat superior* liability.

25 MS. FERGUSON: Then if we focus on the material

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1 support case, they are post-attack payments, which would not be  
2 evidence of material support.

3 THE COURT: Not necessarily. Not necessarily. It  
4 doesn't move it in the other direction. If it goes this way,  
5 it goes that way. If after I go out and mug somebody, I come  
6 back and you give me \$10, there is a reasonable inference that  
7 is unexplained that maybe I had some connection with that, as  
8 opposed to if I came to you and said, give me \$10, I said why  
9 should I give you \$10? I didn't ask you to do that.

10 The jurors would use their own common sense to  
11 determine whether it makes sense that you would do this under  
12 these circumstances. If you have a reasonable explanation as  
13 to why you would do this under these circumstances, it is not  
14 evidence that you were involved. But if you have no reasonable  
15 explanation of why you would pay people for doing it after they  
16 committed terrorist acts, it is reasonable for the jury to say,  
17 well, that doesn't convince me that he had nothing to do with  
18 this. It takes me in the direction that you might have  
19 something to do with this. I think it is probative. That is  
20 my position.

21 We are going to end in five minutes, then we will come  
22 back. I will address this because I just don't remember what  
23 the issue really was. There were eight exhibits that the  
24 plaintiffs asked to be admissible, statements against  
25 defendants. The defendants argue they want statements against

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1 interest.

2 MR. YALOWITZ: Maybe I can refresh your recollection.  
3 So this is a guy like Abdullah Barghouti who pleads guilty to  
4 66 counts of murder and then he is going to be sentenced.

5 THE COURT: Right.

6 MR. YALOWITZ: You live with it every day. There are  
7 people who say, I regret it and I am sorry. That's a statement  
8 against interest because they're admitting their guilt. There  
9 are people who say, I am proud of what I did and I would do it  
10 again. That's a statement against interest; he is about to be  
11 sentenced. Then there are people who say that you have before  
12 you an innocent man and that is not a statement against  
13 interest. So these are all statements of people who said  
14 either I am proud of it or I did it, but I regret it.

15 THE COURT: I don't understand what the dispute was.  
16 What is the objection?

17 MR. SATIN: Your Honor, we have a few different  
18 objections. One, I think the best way to discuss them is to  
19 talk about what the statements are. I don't know if the court  
20 has them in front of them.

21 THE COURT: I have a few of them.

22 MR. SATIN: With the court's permission, can I take  
23 two minutes to just read them?

24 THE COURT: No. Let's do this first. Let me go to  
25 another issue first. I wondered if we could look at something

F16SSOK1

1 over lunch. I want to go to the photos. I just want to get  
2 the photos, then we can take a lunch break and discuss that  
3 further after lunch, then we can come back to that.

4 There are several objections to the photos, and this  
5 is my reaction to the photos. I will let in most of the  
6 photos, but most of the gruesome photos I am not going to  
7 allow. I think it is more prejudicial than probative.

8 The photos that are basically depicting body parts  
9 and/or significant amounts of blood, particularly my  
10 understanding is most of those photos are not photos of any  
11 plaintiff or plaintiff's relative in this case.

12 MR. YALOWITZ: That is what I was going to say. Two  
13 that were -- that is fine. You have got the two areas where I  
14 just want to think about it is you have some photos that  
15 plaintiffs saw. So a kid who went and looked at the photos of  
16 the bus being blown up where his dad was murdered.

17 THE COURT: Is his dad on the bus?

18 MR. YALOWITZ: Yes, so that goes to his trauma. You  
19 have body bags where there was coverage of a girl in a body bag  
20 and her hair kind of spilling out of the body bag and the dad  
21 saw that on the news. That is one category.

22 Then the other category is you have things that the  
23 plaintiffs saw because they were in the attacks. Rena Sokolow  
24 saw the head of the suicide bomber. We have a photograph from  
25 the autopsy of the head.



F16SSOK1

1 THE COURT: Why is that so much more revealing than  
2 her testimony?

3 MR. YALOWITZ: She saw it. I think the jury is  
4 entitled to see it.

5 THE COURT: She saw it to her damage. Why should the  
6 jury see it to their damage? She can testify to it. You think  
7 that that will raise your dollar value?

8 MR. YALOWITZ: I think that is why the defendants  
9 don't want it in.

10 THE COURT: Let me just tell you this, and we can  
11 discuss which one is next. Let me just go through what I have  
12 as Exhibit 1. I don't know what the pages are. I don't have  
13 any problem with the first photo.

14 MR. YALOWITZ: I'm sorry, your Honor. Just bear with  
15 me a minute.

16 THE COURT: Maybe you can just write this down and  
17 look at it. I will tell you the ones I have a problem with and  
18 you can convince me later.

19 The first one, I don't have a problem with. The  
20 second one I do. I guess it is Bates number page 6380. I have  
21 a problem with that one. I have a problem with the one after  
22 that, 81. I don't have a problem with 82. I don't have a  
23 problem with the next one, which is 87. I don't have a problem  
24 with the next one, which is 90. I have a problem with 91. I  
25 don't have a problem with 95. I don't have a problem with 96.

F16SSOK1

1 I don't have a problem with 97.

2 Let me make sure I have this.

3 I have a problem with 99. I don't have a problem with  
4 00. I don't have a problem with 01. I have a problem with 02.  
5 I have a problem with 03. The next one, I don't know if it has  
6 a Bates number, a small picture of two people. I don't have a  
7 problem with that. The one right after that is an aerial shot  
8 down. I don't have a problem with that. The one that is there  
9 page 8185, I do have a problem with.

10 The one after that, I think 165 or 185 -- 185, again,  
11 I have a problem with that. Page 239, those two photos, I  
12 don't have a problem with. 240 I don't have a problem with.  
13 241 I don't have a problem with. 239 I don't have a problem  
14 with. 240 I don't have a problem with. 241 I don't have a  
15 problem with.

16 I have a problem with 187. I have a problem with --  
17 187, after that, the next photo. The 186 six right after that,  
18 I have a problem with those two photos. The 186, again, I  
19 guess it is the next photo, I have a problem with that photo.  
20 Is that five or eight seven? 587 I don't have a problem with.  
21 561, the next one, I don't have a problem. 388 I do have a  
22 problem with that. 287, I don't have a problem with that. I  
23 don't have a problem with the next one. I think it is 519. I  
24 don't have a problem with the next one, 518, I believe. I have  
25 a problem with 564. I have a problem with 565. I have a

F16SSOK1

1 problem with 566. I don't have a problem with 567. I don't  
2 have a problem with 568. I don't have a problem with 569. I  
3 don't have a problem with 570. I don't have a problem with  
4 571. I don't have a problem with 572. No problem with 573.  
5 No problem with 574. I have a problem with 564.

6 MR. YALOWITZ: What's the court's rule with 564?

7 THE COURT: I have a problem with that.

8 I have a problem with the next one, 565. I have a  
9 problem with the next one, 566. I don't have a problem with  
10 567. I don't have a problem with 568. I don't have a problem  
11 with 569. I don't have a problem with 570. I don't have a  
12 problem with 571. I don't have a problem with 572. I don't  
13 have a problem with 573. I don't the have a problem with 574.  
14 I don't have a problem with the next one, which is marked  
15 plaintiff's exhibit 1124. I don't see a Bates stamp.

16 MR. YALOWITZ: On 1124?

17 THE COURT: No problem.

18 MR. YALOWITZ: Thank you.

19 THE COURT: 1123, no problem. 1122, no problem. I'm  
20 sorry, I do have a problem with that.

21 1122, plaintiff's exhibit which is page 528. The  
22 other shots, I don't have a problem with the individual photos.  
23 I think the objection was really as to the photos of people  
24 holding guns. My problem is, I just don't know who these  
25 people are. You would have to tell me who these people are.

F16SSOK1

1 MR. YALOWITZ: I think, just going from  
2 recollection -- I apologize, I don't have the exhibit in front  
3 of me, but Ali Jara has a gun in the background. He is a  
4 suicide bomber. He is dead. Mohamed Hashaika has a headband  
5 and a gun. I'm not sure where our photo lands with the gun  
6 whether it is cropped or not. We know she is a suicide bomber.

7 THE COURT: Is there anybody who is holding a gun who  
8 is not an actual suicide bomber?

9 MR. YALOWITZ: There is one guy who has photos with  
10 guns who was liquidated by the IDF for being a multi-terror  
11 attack killer. I don't think the photo we are going to use of  
12 him has him with a gun, I think we just want his face. I just  
13 would have to look at it over lunch.

14 THE COURT: You tell me who, and they have to tell me  
15 why -- my initial reaction, to the extent these were suicide  
16 bombers, the fact they are holding guns is not particularly  
17 either revealing or objectionable. You expect them to be  
18 dedicated to some form of violence. It is not an issue.

19 If somehow it is implying something that is unfair to  
20 the defendants, then you can let me know what that is after  
21 lunch. That is pretty much, if you want to take a look at  
22 those photos between now and Monday or take a look at them over  
23 lunch, we can discuss it further.

24 MR. YALOWITZ: I need to take a look. You called some  
25 balls and strikes. I'll look at it.

F16SSOK1

1 THE COURT: Once you look at the photos, you can see  
2 my pattern.

3 MR. YALOWITZ: I can guess.

4 THE COURT: To the extent that you have photographs, a  
5 lot of the photographs came in. I don't know if you need them  
6 all. I am just dealing with the objections. To the extent  
7 that people want to talk about what they saw, they were there,  
8 how it affected them, I think that is appropriate. It is part  
9 of the damages. I think some of these photos are a bit much.  
10 It's hard for me to make a determination that it is not more  
11 prejudicial than probative.

12 MR. HILL: Your Honor, could I raise one issue? This  
13 is a question of whether the plaintiffs observed the photos.  
14 Many of these were not produced during fact discovery. I  
15 deposed most of the plaintiffs. I did not give them an  
16 opportunity to ask them whether they saw particular photos. If  
17 plaintiffs could be directed to identify which plaintiffs saw  
18 any of these photos. Right now, I have no idea who allegedly  
19 saw what.

20 THE COURT: Do you have a witness that you are going  
21 to associate with these photos, utilizing these photos?

22 MR. YALOWITZ: Yes. Look, we have asked for so many  
23 post discovery -- the answer is yes, we are not just going to  
24 put the photos loose in front of the jury. We are going to  
25 talk about them with the witness. The idea of giving the

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1 defendants more discovery right now would really stick in my  
2 craw because these people have been scorched Earth,  
3 uncooperative, shut me down, and to have the gall to ask me to  
4 identify which of my clients saw, which of the photos on the  
5 eve of trial, they will find out in the testimony.

6 THE COURT: You have similar issues with some of their  
7 witnesses too.

8 MR. YALOWITZ: What do you mean?

9 THE COURT: I have some motions by you to preclude  
10 witnesses that you say were not identified.

11 MR. YALOWITZ: Right.

12 THE COURT: Even though you may be hurt, your feelings  
13 may be hurt, the same rule applies to both sides.

14 MR. YALOWITZ: I agree.

15 THE COURT: I am going to apply the same rule. You  
16 tell me what rule to apply to them, that's the rule I will  
17 apply to you.

18 MR. YALOWITZ: I want them to keep out witnesses they  
19 didn't get rule 26(a) disclosures for.

20 THE COURT: And your witnesses too?

21 MR. YALOWITZ: I don't have any witnesses. We  
22 didn't --

23 MR. HILL: These are documents that weren't produced  
24 during discovery. They shouldn't be allowed. If the rule is  
25 discovery is at the end, they shouldn't come in.

F16SSOK1

1 THE COURT: Shouldn't that apply to both testimony and  
2 exhibits? Isn't that the rule?

3 MR. YALOWITZ: No, because I collected these from  
4 third-party sources.

5 THE COURT: What does that have to do with it?

6 MR. YALOWITZ: Because if they are in my possession,  
7 custody, and control, I have got to turn them over.

8 THE COURT: They were in your custody and control when  
9 you collected them.

10 MR. YALOWITZ: When I collected them, I turned them  
11 over.

12 THE COURT: You say you didn't have these in your  
13 possession or didn't have these in your possession and they  
14 were not requested of you during discovery?

15 MR. YALOWITZ: I did not have them in my possession  
16 during fact discovery. I got them from public sources, and as  
17 I got them, I turned them over.

18 THE COURT: If you turned them over in a timely  
19 manner --

20 MR. YALOWITZ: I did.

21 THE COURT: -- that's the rule. If you didn't turn  
22 them over in a timely manner, then they're excluded. That's  
23 the same rule with regard to exhibits and the same rule with  
24 regard to witnesses.

25 Let's take a lunch break. I will see you at 2:30.

F16SSOK1

1 MS. ROMEO: Before we break, some procedural issues we  
2 can talk about in the afternoon. I have a proposed AV order  
3 that I would like to hand up.

4 THE COURT: Sure. Give them to my law clerk.

5 (Luncheon recess)  
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1 THE DEPUTY CLERK: All rise.

2 THE COURT: Be seated.

3 Okay, as I assume everyone is aware by now, the Second  
4 Circuit has denied the Petition for Re-Mandamus and Motion For  
5 A Stay, so.

6 MR. YALOWITZ: Your Honor, I'm sorry, I didn't mean to  
7 interrupt. I just wanted to come back to the photos, which we  
8 had an opportunity to review over lunch.

9 First of all, the guys with guns, as I thought, there  
10 are three suicide terrorists who were shown photographs with  
11 guns. And then there are two guys who were liquidated by the  
12 IDF, who were shown with guns. Those are the only gun people  
13 in the photographs that I saw.

14 THE COURT: And what you refer to as the "liquidated  
15 guys," what is the purpose of that?

16 MR. YALOWITZ: Just to show who they were and what  
17 their relation was.

18 THE COURT: I'm not sure what the relevance of the  
19 liquidation is.

20 MR. YALOWITZ: For example, one, one guy was killed.  
21 And immediately thereafter, the defendant's top -- well, Marwan  
22 Al-Barghouti, top PLO and PA guy, ordered a bunch of terrorist  
23 attacks, one of which was the Wafa Idris attack. One was the  
24 January 22 attack. So it's really to help the jury understand  
25 the timing.

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1 THE COURT: I'm sure you confused me, so I don't know  
2 if they will understand the timing.

3 What do those two people have to do with this case?

4 MR. YALOWITZ: One of them was -- I don't think we're  
5 going to use, so we don't need to talk about him.

6 THE COURT: Tell me that so we can get rid of his  
7 photo.

8 MR. YALOWITZ: Freitakh.

9 THE COURT: All right.

10 MR. YALOWITZ: Raed al-Karmi.

11 THE COURT: All right. So do you know which photo in  
12 your exhibits that you are talking about that you are not going  
13 to use.

14 MR. YALOWITZ: That we're not going to use?

15 THE COURT: Yeah.

16 MR. YALOWITZ: I could look at it and tell you.

17 THE COURT: As long as the defense knows, that's all  
18 right. Do you know what photo you are saying, now, is not  
19 going to be used?

20 MR. YALOWITZ: If they don't --

21 MR. HILL: The one of the guy standing in front of the  
22 flames.

23 MR. YALOWITZ: Let me see. Yeah, that's good.

24 THE COURT: Okay. All right. Not going to use it, so  
25 who is the other guy?

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1 MR. YALOWITZ: Other guy's name is Raed al-Karmi. So  
2 here's the story with him. One of the defendant's lines of  
3 defense is we couldn't control the violence. We were just  
4 trying to tamp it down. And other people, away from us,  
5 committed violent acts, all right, against our wishes.

6 That's their defense. Rogue employees. So, in  
7 December of 2001, the Yasser Arafat declared a ceasefire of  
8 terror activities. December 16th, 2001. And the ceasefire  
9 wasn't perfect, but it held for a significant period of time.  
10 About four weeks.

11 THE COURT: You are still giving me more information  
12 that is not helpful. Tell me who the guy is and why he has  
13 anything to do with this case.

14 MR. YALOWITZ: The terrorist who was killed.

15 THE COURT: Okay, by whom?

16 MR. YALOWITZ: By the Israeli defense forces.

17 THE COURT: Not involved in any of the terrorist  
18 attacks at issue in the case.

19 MR. YALOWITZ: Correct.

20 THE COURT: When you say he was a terrorist, he  
21 was convicted of committing some terrorist act?

22 MR. YALOWITZ: He was killed because he was a  
23 terrorist.

24 THE COURT: Okay. So when you say "terrorist," and  
25 that's -- they have dispute issues with that. But when you say

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1 "terrorist," do you mean that he previously committed a  
2 particular terrorist act?

3 MR. YALOWITZ: He committed many terrorist attacks  
4 and --

5 THE COURT: Okay.

6 MR. YALOWITZ: -- and managed the financial and  
7 operational activities of a group of --

8 THE COURT: All right.

9 MR. YALOWITZ: -- warrior brother terrorists.

10 THE COURT: So he was killed by the Israelis.

11 MR. YALOWITZ: Correct.

12 THE COURT: So what does that have to do with the  
13 defendant?

14 MR. YALOWITZ: Immediately after that, the defendants  
15 dissolved the ceasefire and started a series of terror attacks.  
16 So he is an important part of the chronology that puts the lie  
17 to their defense.

18 THE COURT: What evidence are you going to present,  
19 other than temporal proximity, that they engaged in terrorist  
20 attacks because he was killed?

21 MR. YALOWITZ: Marwan Al-Barghouti's confession.  
22 Marwan Al-Barghouti's --

23 THE COURT: Going to say what?

24 MR. YALOWITZ: I sat in the mourners' tent at Raed  
25 al-Karmi's funeral, and said this has to be avenged.

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1 THE COURT: Who said it?

2 MR. YALOWITZ: Marwan Al-Barghouti said that.

3 THE COURT: Okay. And what's the purpose of the  
4 photo?

5 MR. YALOWITZ: Just to help the jury keep track of the  
6 guy. Because there is a lot of guys with Arabic names.

7 THE COURT: Who cares what this guy is. He has no  
8 other role, other than you say he was designated a terrorist,  
9 was killed by the Israelis, and in response, they did further  
10 acts of terror.

11 MR. YALOWITZ: He shows up in other things. Shows up  
12 in documents of terror financing where Arafat is approving  
13 direct payments to the guy and his underlings. So he shows up  
14 in the case. He is not a core player. But he shows up enough.  
15 I just want a board with a picture, so when we talk about him,  
16 the jury knows who the heck he is.

17 THE COURT: I don't think they have a problem with the  
18 picture, I think they have a problem with the gun.

19 So if you want a picture of him, that's not a problem.  
20 What they have a problem with, is the picture of the gun, so.

21 MR. YALOWITZ: I wasn't the guy who stood and posed  
22 with the gun. I mean he possessed with the gun.

23 THE COURT: I'm sure that's not the only picture he  
24 posed with. Which picture are we talking about?

25 MR. YALOWITZ: Help me out. I only have -- do you

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1 know, do you have it, Mr. Hill?

2 MR. HILL: I only know because you told me, but  
3 according to you, it is the one with the blue background where  
4 the guy is holding some sort of machine gun.

5 MR. YALOWITZ: Right. That's him.

6 THE COURT: Is that --

7 MR. YALOWITZ: That's him.

8 MR. HILL: Part of the objection is there is no  
9 witness who is going to say that's him.

10 MR. YALOWITZ: Oh, yeah. Okay.

11 THE COURT: All right. So this guy, how are you going  
12 to get this picture in?

13 MR. YALOWITZ: Well, first of all, I don't need it in  
14 evidence.

15 THE COURT: Well, then, you don't show it to the jury.

16 MR. YALOWITZ: All right, well --

17 THE COURT: That's the rule.

18 MR. YALOWITZ: All right. Then I have somebody who  
19 can identify him.

20 THE COURT: Only what you get in evidence, will the  
21 jury see.

22 MR. YALOWITZ: Fine. I have somebody who can identify  
23 him.

24 THE COURT: All right. Are you going to have somebody  
25 identify this person?

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1 MR. YALOWITZ: Correct.

2 THE COURT: And who will that be?

3 MR. YALOWITZ: Alon Eviatar.

4 THE COURT: And in what context?

5 MR. YALOWITZ: I'm going to put his picture up and say  
6 who is that.

7 THE COURT: Okay, all right. And then again, the  
8 context in which the jury is going to look at this photo is  
9 this is the person that was killed by the Israelis, identified  
10 by them as a terrorist and, as a result, after this killing --

11 MR. YALOWITZ: A slew of suicide terror attacks inside  
12 of Israel was begun by the Al Aqsa Martyrs Brigades led by  
13 Marwan Al-Barghouti.

14 THE COURT: And the --

15 MR. YALOWITZ: Who, by the way, your Honor, just so  
16 we're clear, between the date that this guy was killed and the  
17 day of the first of these series of attacks, Marwan  
18 Al-Barghouti published an Op-Ed piece xxx in the Washington  
19 Post saying if the Israelis want security, they have to accede  
20 to territorial demands. And then --

21 THE COURT: That's politics, that's not terror.

22 MR. YALOWITZ: Okay, but it's the same guy.

23 THE COURT: Well, yeah, but what does that -- I don't  
24 understand what you are proving by that. He could have said  
25 if -- if they want peace, that they should draw a line in the

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1 sand, and they should live on one side and we should live on  
2 the other side. What does that have to do with advancing any  
3 issue in this case?

4 MR. YALOWITZ: Because one of the elements in that  
5 case is a -- the apparent intent to influence the conduct of a  
6 government through violence. So when the guy goes and  
7 publishes an Op-Ed piece in the Washington Post saying --  
8 Washington Post? What's he doing publishing an Op-Ed piece in  
9 the Washington Post if he is not trying to influence the to --

10 THE COURT: Well, the Pope could have published that  
11 same statement --

12 MR. YALOWITZ: And then he goes and he commands a  
13 bunch of terror attacks.

14 THE COURT: Okay.

15 MR. YALOWITZ: So it's the same guy.

16 THE COURT: Okay. I'm not saying that that is  
17 necessarily inadmissible. I just don't see where you are going  
18 to persuade the jury, just because he made that statement that  
19 that makes him a terrorist. But that's not the issue, so I  
20 don't really --

21 MR. YALOWITZ: The issue is, it links him to the  
22 apparent intent to influence the policy of the United States  
23 government.

24 THE COURT: How? I mean that's -- we know that's the  
25 political view of every terrorist or nonterrorist on that side



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1 of the issue.

2 MR. YALOWITZ: Usually they don't write it in the  
3 Washington Post, though.

4 THE COURT: Why not?

5 MR. YALOWITZ: You don't see it.

6 THE COURT: Everybody says it, right? Most of them  
7 say it. You don't say that nonterrorists don't hold that same  
8 position.

9 MR. YALOWITZ: I agree with that. It's -- standing  
10 alone, the Washington Post doesn't teach us anything. Standing  
11 alone, the Washington Post is just the Washington Post.

12 THE COURT: Okay.

13 MR. YALOWITZ: It's the context of the other evidence.

14 THE COURT: All right. So the bottom line is that --  
15 how many pictures do you have with guns?

16 MR. YALOWITZ: There is five in there.

17 THE COURT: You are going to use four.

18 MR. YALOWITZ: I'm going to use four.

19 THE COURT: And three of those individuals --

20 MR. YALOWITZ: Suicide.

21 THE COURT: -- are people perpetrating suicide attacks  
22 that are at issue in this case.

23 MR. YALOWITZ: Correct.

24 THE COURT: And the one is one who was killed by the  
25 Israelis, having identified him as the perpetrator of several

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1 other attacks?

2 MR. YALOWITZ: Correct.

3 THE COURT: And then in response to that, you say the  
4 evidence is going to indicate that the defendants decided to  
5 increase the level of violence.

6 Is that your theory?

7 MR. YALOWITZ: To stop their ceasefire.

8 THE COURT: Okay.

9 MR. YALOWITZ: Which indicates that they controlled  
10 the violence.

11 THE COURT: Okay.

12 MR. YALOWITZ: Because they stopped it.

13 THE COURT: Okay.

14 MR. YALOWITZ: And started it again.

15 THE COURT: Okay, all right.

16 MR. YALOWITZ: And if I may, your Honor?

17 MR. ROCHON: Your Honor --

18 MR. YALOWITZ: Did you want to hear from Mr. Rochon on  
19 the question of the guns?

20 THE COURT: If you're finished with the pictures.

21 MR. YALOWITZ: I'm not finished with pictures. I'm  
22 finished with the guns.

23 THE COURT: Let me deal with the guns.

24 Do you have anything else to say about the guns?

25 MR. ROCHON: You can see how far afield we are getting

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1 from this evidence that is on trial through this argument. So  
2 in an effort, supposedly, to get this photograph in, we are  
3 talking about someone name Marwan Al-Barghouti, who is not  
4 ours. He was a legislator, not a PA employee. And whether or  
5 not he then spoke to people to try to instigate other actions,  
6 which are not our actions, right, xxx Carney, the guy they are  
7 talking about, supposedly did all of the other terror acts that  
8 are not charged or part of the complaint here. And so the  
9 notion that this guy is going to be a big part of the trial, so  
10 the notion we need a picture of him with a gun is sort of  
11 eating up the general premise, which is we should be here to  
12 try seven incidents and any connection to them. And, suddenly,  
13 we are talking about Washington Post Op-Eds by Marwan  
14 Al-Barghouti. There is a great danger if we don't keep this  
15 evidence under control of a trial that simply becomes about  
16 everything bad that happens over there, as opposed to liability  
17 over the seven incidents that are currently before the Court.

18 And Mr. Yalowitz has got a theory of, I guess the  
19 Second Intifada, and Marwan Al-Barghouti, and whether this  
20 guy's assassination contributed to it. He doesn't have a  
21 statement from the PA saying the ceasefire is over. He infers  
22 that the ceasefire was over because, suddenly, violence  
23 occurred. And the fact that violence occurred is unfortunately  
24 all too common during this period. The question is whether the  
25 PA or the PLO should be liable.

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1           And so the concern I have is this guy with this gun  
2 becomes a vehicle to get in all this unrelated stuff, not  
3 related to the complaint.

4           The other thing I constantly need to remind the Court  
5 is that there are two defendants on trial. Every time somebody  
6 says he was their guy, you got PLO people, you have PA  
7 employees. Those are two different defendants. And we have to  
8 keep those things separate in the trial, both in comments of  
9 counsel, legal rulings, instructions to the jury, as well.

10           So Mr. Yalowicz's argument that starts with this man  
11 with the gun, it sprawls into all these ancillary issues that  
12 we need to the keep under control. So we focus on the seven  
13 incidents and whether we are liable for them.

14           THE COURT: All right.

15           MR. YALOWITZ: I thought we were talking about the  
16 guys with the guns, and not having a closing argument. But can  
17 I talk about -- there is two photos that I just want to come  
18 back to the Court on.

19           THE COURT: Go ahead.

20           MR. YALOWITZ: All right, thank you.

21           The first is, it's 1122. It's little boy laying on  
22 the ground.

23           THE COURT: 1122?

24           MR. YALOWITZ: Yeah.

25           THE COURT: Okay.

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1 MR. YALOWITZ: Do you have it before you?

2 THE COURT: Yes.

3 MR. YALOWITZ: All right. I know you have seen it.

4 It's a little boy laying on the ground, seven years old. That  
5 is one of the plaintiffs, your Honor.

6 THE COURT: That's one of the plaintiffs?

7 MR. YALOWITZ: Yeah.

8 THE COURT: Let me just find the photo.

9 MR. YALOWITZ: And the man leaning over him talking on  
10 the phone, is his dad.

11 THE COURT: Sorry just a sec. What is before or after  
12 that?

13 MR. YALOWITZ: Well, it's --

14 MR. ROCHON: The one after -- I think would be this  
15 one, Judge.

16 THE COURT: Okay, the head shot.

17 MR. ROCHON: That's the one after. The one he is  
18 referring to is this one.

19 MR. YALOWITZ: Thank you.

20 THE COURT: You say 1122?

21 MR. YALOWITZ: 1122, yeah.

22 THE COURT: All right. Quite frankly, this is one of  
23 my borderline photos. So having told me that this is one of  
24 the plaintiffs, I'm going to allow that one in.

25 MR. YALOWITZ: Thank you. Thank you, your Honor.

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1 THE COURT: My position is still the same as to the  
2 others. Unless you have some specific thing to argue, other  
3 than this shows --

4 MR. YALOWITZ: Well, the only one I want to reserve on  
5 that we have already discussed it is the head of Wafa Idris.  
6 And I want to the reflect on it. And as we go through trial, I  
7 understand right now your Honor's inclination is not to admit  
8 it because of 403, but maybe when you hear the testimony, you  
9 might revisit it.

10 THE COURT: I can't think of any of the photos, or few  
11 of the photos, that are more prejudicial than that.

12 MR. YALOWITZ: Well, that's kind of the point of  
13 having lived through it, isn't it?

14 THE COURT: Not necessarily.

15 MR. YALOWITZ: All right. Well, as I said, I --

16 THE COURT: I mean the point is, is that, you know,  
17 certain things occur to certain people. The fact that you have  
18 the body part of a terrorist, you know, that's not as  
19 significant as the victim who is the plaintiff who is laying on  
20 the ground.

21 MR. YALOWITZ: Understood. Look, I understand your  
22 Honor's rulings. And in limine rulings are always subject  
23 to -- I'm not saying I'm going to come back, but I'm not saying  
24 I'm not going to come back, that's all I'm saying.

25 THE COURT: If the case develops to where that seems

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1 to be, as things gel that seems to be the claim or the defense,  
2 then you can deal with that.

3 MR. YALOWITZ: Right, thank you.

4 THE COURT: I'll tell you on the other pictures, the  
5 guns, on the issue of the people who are supposedly or  
6 allegedly or actually the perpetrators of the acts in question,  
7 I don't have any problems with those photos. So borderline of  
8 the photo of this other person, I think has minimal probative  
9 value, but in light of those other photos, I don't think it has  
10 a particularly significant prejudice to the defendant because a  
11 person who is killed is photographed.

12 MR. HILL: This may go without saying, but I assume  
13 the plaintiffs are going to have to put on a sponsoring witness  
14 authenticate that the photos are --

15 THE COURT: They will be identified and authenticated.

16 MR. HILL: I don't think they have a witness with a  
17 factual knowledge, but we'll sort that out at trial.

18 THE COURT: I need a witness who is going to say who  
19 this person is. I don't need a witness who took the picture, I  
20 need a witness who says they recognize that photograph and can  
21 identify it, and it is actually the photograph of the person  
22 who they are identifying it to be. That there is no genuine  
23 dispute about that. Then that's a normal foundation to come  
24 in.

25 MR. YALOWITZ: I should say, you know, I keep hearing

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1 this kind of malarkey about foundational witnesses. There is  
2 no genuine dispute of who these photographs are of.

3 THE COURT: That's fine but I'm not going to relieve  
4 you of all of your obligations.

5 MR. YALOWITZ: I get it, I get it. I'm not shirking  
6 my obligations. But this case is gonna go on for a very long  
7 time, if every time we offer an exhibit there is a pop-up from  
8 the defendants and a sidebar about, you know --

9 THE COURT: That's not going to happen.

10 MR. YALOWITZ: All right, thank you.

11 THE COURT: That's why I am spending the time, now, to  
12 give you some guidance. And my guess is that pretty much when  
13 you get to each exhibit you are going to pretty much know what  
14 my position is with regard to that type of exhibit, and the  
15 purpose for which you are offering it, and what you need to do  
16 to get it in evidence. So that's my view with regard to the  
17 photographs.

18 MR. YALOWITZ: Thank you.

19 THE COURT: And we can put that aside. And, then, I  
20 can always give you a further ruling with more information in  
21 the context of how this trial develops.

22 Let me just move on quickly to.

23 THE COURT: We also need, before we can print the  
24 questionnaire, we need a final version of the attachment.

25 There is supposed to be an attachment. I believe a number of



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1 witnesses, potential witnesses, I think that was the  
2 attachment.

3 MR. HILL: Well, the parties exchanged updated witness  
4 lists yesterday, so it would be relatively easy to come up with  
5 that list of names and get it to your Honor.

6 How shall we do that, mechanically?

7 THE COURT: E-mail it to my law clerk, so we can just  
8 attach it and have it. So we are making copies and ready for  
9 the jury for tomorrow morning.

10 MR. HILL: We'll do that, as soon as we get to the  
11 computer. I know you need it tonight, so we'll get it to you  
12 as soon as we can.

13 THE COURT: Defendants have a request with regard to  
14 using the words, *terror*, *terrorist*, *terrorism*. I am not  
15 comfortable saying that there is gonna be some blanket rule  
16 that nobody can use those terms. I mean you have to give me --  
17 I mean I know that there is some proffer, and I'm still working  
18 on that. Between now and Monday, I know there is some proffer  
19 of expert testimony about who is supposed to be a terrorist and  
20 what euphemisms there are for terrorism and that kind of stuff.  
21 Some of which I think is inadmissible. But I don't -- I mean,  
22 look, the statute that defines terrorism, and I will define  
23 terrorism. And if the parties are misusing that term, the  
24 other side, or the Court can make it very clear that that is  
25 not an appropriate use of that term. And the appropriate use

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1 of the term is the legal term that they have to decide. And  
2 so, you know, I will be careful to watch the misuse of that  
3 term. But as a blanket statement, I'm not going to say people  
4 can't use that term. But use it in what you think is an  
5 appropriate context, given the nature of the claims in this  
6 case. But I will entertain any motions on a  
7 question-by-question basis. If it appears to me that it is  
8 being misused, the -- I'm not sure whether there is an issue  
9 left, although there is some discussion from the parties, there  
10 is an issue left with regard to, quote, "inflammatory rhetoric"  
11 about the Israeli/Palestinian conflict. I think I made clear  
12 it is out, period. I mean it's not -- particularly, if there  
13 are statements that are made by people, other than officials or  
14 representatives of the PA or the PLO are clearly not  
15 admissible, let me put that first, say that. So, you know, you  
16 can -- these statements about what people say, or children say,  
17 or what newspapers say, there is no admissibility for that.  
18 And, particularly, if it simply demonstrates animosity toward  
19 Israel, you know, as they say, that's not going to be a  
20 surprise to the jurors in this case, that people on both sides  
21 are gonna make statements with heightened rhetoric with regard  
22 to the other side.

23 So, you know, poems about pigs and statements about  
24 fangs and all of that --

25 MR. YALOWITZ: Statements about?

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1 THE COURT: Fangs.

2 -- has no probative value. Particularly, I don't  
3 think any of these statements that were alluded to are  
4 statements that are being attributed to PA or PLO officials.

5 MR. YALOWITZ: I just want to be crystal clear about  
6 this.

7 THE COURT: Yeah.

8 MR. YALOWITZ: The defendants cherrypicked some  
9 statements and put them in a letter, late last night, and then  
10 they attached a huge exhibit. Filled, you know, a huge list  
11 and misrepresented to the Court that that list contains the  
12 things that they quoted.

13 THE COURT: Yeah.

14 MR. YALOWITZ: So I don't -- I understand the Court's  
15 ruling.

16 THE COURT: Yeah, I'm not --

17 MR. YALOWITZ: The core evidence, which is very, very  
18 inflammatory. I'll tell you, it is very inflammatory. The  
19 core evidence is the defendant's own statements, especially  
20 their statements to their own police in their political  
21 guidance magazines which are printed and created by an official  
22 organ of the Palestine authority called the Directorate for  
23 Political Guidance. And those magazines are distributed for  
24 the benefit and education of the police force. And they have  
25 got some of the most hateful things in them. And that goes to

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1       respondeat superior. That goes to what is the policy, what is  
2       the scope of employment, what are you telling your security  
3       forces to do when you say stuff like: Make a bloody sacrifice  
4       for the State of Palestine. Or: The Jews are the scourges of  
5       the earth.

6               THE COURT: Well, I'm going to put it to you this way.  
7       You may get the first statement or something similar to the  
8       first statement, but you are not going to get the second  
9       statement. If you are going to --

10              MR. YALOWITZ: Your Honor, it's their words, not mine.

11              THE COURT: If you say you have some statement --  
12       listen, if you say you have some statement that is a statement  
13       about what they are telling the people to do, to do, that's one  
14       thing. And you say that what they are telling them to do is to  
15       do violence, that's one thing. But if you are just saying they  
16       are calling them bad names, no, that's not -- that doesn't  
17       bring you to a violent terrorist act. So if to the extent --

18              MR. YALOWITZ: It's incitement, your Honor.

19              THE COURT: If you have statements by representatives  
20       of the PA or PLO directing acts of violence, specifically  
21       directing acts of violence, I may allow you to present that.  
22       But simply by saying I think they are bad people, or I think  
23       they are X, Y, Z, don't you hate them, no, that's -- that's --

24              MR. YALOWITZ: Well, wait a minute, wait a minute,  
25       wait a minute.

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1 THE COURT: No.

2 MR. YALOWITZ: Wait a minute. Could you imagine if  
3 the New York police department had a political guidance unit  
4 and distributed to all of the officers in the field which said:  
5 Red-headed men are the worst of the world --

6 THE COURT: Right.

7 MR. YALOWITZ: -- and this is in a time, and in an  
8 environment, where people are shooting red-headed men.

9 THE COURT: Okay. So how does that advance the  
10 argument that the police officers killed the red-headed man.

11 MR. YALOWITZ: We have already got convictions of the  
12 police officers. This goes to scope of employment. This goes  
13 to scope of employment. They are saying, these defendants sit  
14 here in the courthouse and say, oh, these were rogue employees.  
15 But their own words will bury them, your Honor, because those  
16 words are words in which they are encouraging and inciting the  
17 very violence that is occurring.

18 THE COURT: Any statements that you have that are  
19 telling people to commit violence, I will allow. But simply  
20 statements that, I don't like these people, they are bad  
21 people, no.

22 MR. YALOWITZ: Well, it's not just explicit  
23 statements.

24 THE COURT: I agree. And I'm telling you it is just  
25 explicit statements in this case. Unless you can tell me,

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1 specifically, what statement you say that the jury's more  
2 reasonable conclusion is that this means that this person is  
3 more likely telling them to commit an act of violence, as  
4 opposed to not commit an act of violence. So if you can give  
5 me some statement that I can say that a reasonable jury could  
6 conclude that that says go out and do an act of violence, I'm  
7 likely to give you that.

8 MR. YALOWITZ: All right.

9 THE COURT: But that statement is not just bad --  
10 calling the other side bad names.

11 MR. YALOWITZ: What I'm going to do is I'm going to go  
12 back and look at these magazines with that in mind. And I'm  
13 going to send you the set that I think complies with your  
14 order. Because I don't want to get tripped up on this.

15 THE COURT: You are going to have to identify who you  
16 say is making this statement.

17 MR. YALOWITZ: That's not going to be a problem. We  
18 have expert testimony, very familiar. These are published.  
19 These are magazines published by the defendant's Department of  
20 Political Guidance, which exists for the purpose of educating  
21 the police force on their duties and responsibilities and the  
22 way they should discharge them.

23 THE COURT: If you have some evidence in those  
24 documents, in those publications that are directing the police  
25 officers to conduct acts of violence, then there is a good

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1 chance I will allow you to put that in.

2 MR. YALOWITZ: I'm going to look at them.

3 THE COURT: Simply saying you shouldn't trust them and  
4 you shouldn't like them, and you should hate them --

5 MR. YALOWITZ: Well, you should hate them. In the  
6 context of they have got 700 guys in jail for killing  
7 civilians --

8 THE COURT: Okay.

9 MR. YALOWITZ: -- and they published political  
10 guidance saying, dehumanizing the very people that are being  
11 murdered. And I mean that's incredibly powerful evidence of  
12 scope of employment.

13 THE COURT: That they committed the murder?

14 MR. YALOWITZ: That they committed it consistent with  
15 the policy of the defendant.

16 THE COURT: All right.

17 MR. YALOWITZ: And within the scope of their  
18 employment.

19 THE COURT: I am not simply going to allow you to put  
20 in heightened rhetoric that are not evidence directly of  
21 directing someone to commit an act of violence.

22 MR. YALOWITZ: I think --

23 THE COURT: So you should tell me what language you  
24 want to use, and why you think this is indicative of a signal  
25 to do a terrorist act, and convince me that that is the natural

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1 way, the ones you put to that. I assume you have just as many  
2 strong statements that are unrelated to acts of violence.

3 MR. YALOWITZ: I'm not sure I'm following your Honor,  
4 but I'm going to look at them and I'm going to send them to  
5 you.

6 THE COURT: All right. Well, that's my guidance at  
7 this point.

8 MR. YALOWITZ: All right.

9 THE COURT: I have not looked at the videos, but I'm  
10 not sure what the purpose of the videos is supposed to be.  
11 What do you say the videos demonstrate?

12 MR. YALOWITZ: I'm sorry, what videos are we talking  
13 about, your Honor?

14 THE COURT: Suicide killers for sake of Allah, and the  
15 raw footage.

16 MR. YALOWITZ: So I'll give you an example. There is  
17 a woman who was a driver. She drove Mohamed Hashaika into  
18 Jerusalem, snuck him in in order to help him blow himself up in  
19 front of civilians. She guided him to the spot. She told him  
20 Allah will grant you paradise, you know.

21 THE COURT: So what does that have to do with he  
22 video?

23 MR. YALOWITZ: She says that on the video. She says  
24 this is what I did. It is an interview of her.

25 THE COURT: It's an interview of her by whom?



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1 MR. YALOWITZ: Documentary filmmaker, interviewed her  
2 in jail.

3 THE COURT: Okay. And you want --

4 MR. YALOWITZ: To play the video.

5 THE COURT: It is evidence of what?

6 MR. YALOWITZ: Evidence that she did it.

7 THE COURT: It is her admission of her involvement in  
8 the act, is that what you are trying to say?

9 MR. YALOWITZ: Correct.

10 THE COURT: Okay. Is that the suicide killers?

11 MR. YALOWITZ: I think it's called *Brides of Allah*.

12 THE COURT: And this is a portion of this video you  
13 want to play?

14 MR. YALOWITZ: Correct.

15 THE COURT: How much of a portion of the video?

16 MR. YALOWITZ: Two minutes, three minutes; something  
17 like that.

18 THE COURT: And the portion of the video is her  
19 saying, what?

20 MR. YALOWITZ: Her saying: I guided him to the --

21 THE COURT: Guided who?

22 MR. YALOWITZ: I guided the suicide bomber to the  
23 spot. I told him Allah will protect you, Allah will grant you  
24 paradise. He blew himself up.

25 THE COURT: What is the point you are trying to make?

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1 MR. YALOWITZ: She did it.

2 THE COURT: What does that have to do with this case,  
3 that's what I'm asking. She is, who? What is her relationship  
4 to this case?

5 MR. YALOWITZ: She was convicted of --

6 THE COURT: I know. But is she a PA employee. What  
7 is the relationship to this?

8 MR. YALOWITZ: She was recruited by PA employees to  
9 join the conspiracy, and then the PA put her on the payroll as  
10 a reward for her actions.

11 THE COURT: All right. So you want to show that  
12 portion of the video where she admits doing the act.

13 MR. YALOWITZ: Correct.

14 THE COURT: And you want to offer independent evidence  
15 that, after she did the act, she was rewarded by the PA; is  
16 that it?

17 MR. YALOWITZ: Correct.

18 THE COURT: Okay.

19 MR. YALOWITZ: You got it.

20 THE COURT: Okay, all right.

21 MR. ROCHON: When counsel says "rewarded," I think we  
22 all agree what he is talking about is regular prisoner payments  
23 that they all get, not suggesting something other than the  
24 regular payments that are made.

25 THE COURT: I am not sure he is not suggesting. I

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1 mean you call it "regular payments."

2 MR. ROCHON: I know. But all of them get them. He  
3 said "rewarded for this." I know that is his  
4 characterization --

5 THE COURT: Is it the "all of them get them" that you  
6 don't want before the jury, is that what we're talking about?

7 MR. ROCHON: If one were listening to this record, one  
8 would think that there is something special for this act,  
9 because he said "rewarded."

10 THE COURT: That's what he is trying to let the jury  
11 consider.

12 MR. YALOWITZ: I think the jury could draw that  
13 inference.

14 THE COURT: They are saying that, look, if you get  
15 killed by a terrorist attack, you get a payment. If you get  
16 run over by a truck, you don't get a payment. There is some  
17 logic to that, isn't it?

18 MR. ROCHON: If you get locked up by the Israelis, you  
19 get a payment. She is locked up by Israelis. Her payments are  
20 related to being locked up.

21 THE COURT: I know, but this is a factual issue that  
22 can go before the jury. But the bottom line is that, look, I  
23 don't know whether you are going to be able to make these  
24 links. But the bottom line, if there is only that portion of  
25 that tape that you want to play where she is admitting that she

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1 committed the terrorist acts, consistent with all of my other  
2 rulings, I don't see any reason why that, in and of itself, is  
3 inadmissible. Is there some reason why that, in and of itself,  
4 is inadmissible?

5 MR. HILL: First of all it's the first time we ever  
6 heard that they want to play two minutes. In discovery, we  
7 have had no idea what they wanted to offer, now we know it is a  
8 portion. So if we could have a specific timestamp for each of  
9 these of what they actually want to offer, that would help us  
10 figure out whether or not we have a continuing objection to it.  
11 But this is an out-of-court statement offered for the truth of  
12 the matter asserted by an unsworn declarant.

13 THE COURT: But it is a statement against penal  
14 interest.

15 MR. ROCHON: No, your Honor. She's serving a life  
16 sentence. There is no possibility that criminal liability will  
17 attach to -- will attach to her making this statement.

18 THE COURT: No, that's not true. That's never true.  
19 Anything could happen. They could decide to pardon her. She  
20 could decide that she is so sorry, or so old that they should  
21 let her go. They may decide that they will never let her go  
22 because she never shows a single ounce of remorse.

23 MR. ROCHON: They did, in fact, release her.

24 THE COURT: Well, then I'm saying that belies your  
25 argument. That their argument is it doesn't make it not a

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1 statement against penal interest simply because she's is  
2 already in jail.

3 MR. ROCHON: Yes.

4 MR. HILL: Yes, it does, your Honor.

5 THE COURT: Most people who make a statement of penal  
6 interest are in jail when they make those statements.

7 MR. HILL: No, but most of these statements are  
8 preconviction. This is a post-conviction statement. The rules  
9 are very clear. It has to be against her interest, because it  
10 could lead to criminal liability. This is someone who was  
11 already suffering criminal liability for the crime that is  
12 stated here. So it might have been against her penal interest  
13 to make this statement before she was convicted. But post  
14 conviction, she cannot receive any additional criminal  
15 liability. As opposed the sentence, I understand that point.  
16 But that's not what the rule says. The rule talks about  
17 criminal liability. So she's already adjudged liable of this  
18 crime at the time she makes the statement. So the statement is  
19 not against her penal interest at that point, because she is  
20 already liable.

21 THE COURT: All right.

22 MR. HILL: So it can't come in for the truth of the  
23 matter asserted. And then the question is well, why would it  
24 come in?

25 THE COURT: You don't dispute the truth of the matter

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1 asserted.

2 MR. HILL: Well, that's the other point. If you are  
3 going to allow the conviction, this is purely cumulative. What  
4 Mr. Yalowicz is telling you is this is outrageous stuff. It  
5 talks about how this is God's will, and she praises God, and  
6 stuff like that. It's going to be very inflammatory to the  
7 jury to hear this person saying these things, as opposed to  
8 establishing the fact of her involvement in the crime.

9 THE COURT: Very few people don't say those things.

10 MR. HILL: Well, it's gonna be more prejudicial than  
11 probative. It's going to be cumulative.

12 THE COURT: All right. Everyone involved in these  
13 acts make those statements.

14 MR. HILL: Yes. And they are prejudicial.

15 THE COURT: Not unexpected by a jury.

16 MR. HILL: But they not probative of the defendant's  
17 liability. This is a nonemployee making essentially a  
18 political or religious statement about the crime, that there is  
19 independent evidence of that you have indicated you are going  
20 to admit. So if it's the facts of the crime that the  
21 plaintiffs want to prove, this is cumulative of that fact.

22 THE COURT: Well, the plaintiff should give you what  
23 portions they want to play.

24 MR. HILL: Fair enough.

25 THE COURT: And I'll rule on it. If it is already

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1 evidence that she has committed this crime, and the evidence is  
2 that they may give her payments after committing this crime. I  
3 mean I don't even know what the sequence of events is. Is it  
4 that she was given these payments before or after she made this  
5 video.

6 MR. ROCHON: Before.

7 MR. YALOWITZ: Both.

8 THE COURT: So the payments began before she made the  
9 video.

10 MR. YALOWITZ: Correct.

11 THE COURT: I assume the payment your client --

12 MR. YALOWITZ: One could argue that it is a statement  
13 by an employee.

14 THE COURT: Well, I don't know.

15 MR. YALOWITZ: Within the scope of her employment.

16 THE COURT: I don't know. Was she employed at the  
17 time?

18 MR. YALOWITZ: Well, they put her on the payroll. I  
19 think there is a fact dispute about whether or not that makes  
20 her an employee.

21 THE COURT: I don't think that is a fact dispute.  
22 about whether that makes her an employee. If she's an  
23 employee, she's working for them.

24 MR. YALOWITZ: Well, she's in jail.

25 THE COURT: Well, so then you have to tell me what she

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1 is being employed as.

2 MR. YALOWITZ: Apparently to spread around propaganda.

3 THE COURT: What?

4 MR. YALOWITZ: Apparently to spread around propaganda.

5 THE COURT: Well, that's a nice theory, but I'm trying  
6 to figure out whether you are making that up as you go, or you  
7 have some proof.

8 MR. YALOWITZ: I think it is an admission against  
9 penal interest. I think it's pretty obvious. Mr. Hill just  
10 has the wrong clip in mind about God's will, and so on.

11 THE COURT: You tell me exactly what portions you are  
12 going to play.

13 MR. HILL: There's three videos, so we're going to get  
14 the specific information.

15 THE COURT: What's the other tape?

16 MR. YALOWITZ: Other tape is Adbullah Barghouti, the  
17 bomb maker.

18 THE COURT: What is the purpose of offering his  
19 statement?

20 MR. YALOWITZ: Again, he describes his crimes.  
21 Describing his crimes.

22 THE COURT: Okay. So what's the purpose of that?

23 MR. YALOWITZ: To show that he did it.

24 THE COURT: Well, I thought you already showed that he  
25 did it.



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1 MR. YALOWITZ: Well, to bring life to the -- it's one  
2 thing to have a paper conviction. It is another thing to see  
3 the person, and they -- it gives the --

4 THE COURT: So this is in what context, just another  
5 jailhouse interview?

6 MR. YALOWITZ: Correct, correct.

7 THE COURT: Okay. And he says I did it?

8 MR. YALOWITZ: Correct.

9 THE COURT: And other than just --

10 MR. YALOWITZ: I want to --

11 THE COURT: -- using that to further emphasize the  
12 fact that he did it, is there a purpose, is there a related  
13 purpose?

14 MR. YALOWITZ: It's to give life so that the jury  
15 understands what is involved.

16 But with regard to Abdullah Al-Barghouti, I want to  
17 take a look. Because I'm not as sure of what, if anything, I'm  
18 going to use on that.

19 THE COURT: All right.

20 MR. YALOWITZ: So if I'm going to use something on  
21 that, I will send it to Mr. Hill.

22 THE COURT: Is that *For the Sake of Allah*.

23 MR. YALOWITZ: *For the Sake of Allah*.

24 THE COURT: If you are going to use anything on that,  
25 you should send it to them before Monday.

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1 MR. YALOWITZ: You got it. I'm sorry, before when?

2 THE COURT: Monday.

3 MR. YALOWITZ: All right.

4 THE COURT: All right. Let them know if you think  
5 there is any possibility that you are going to use it. You  
6 should tell them what it is. You can always change your mind  
7 not to use it. But I'm not going to let you say you are not  
8 going to use it and then you say, yeah, we're going to do it.

9 What's the difference between the footage and raw  
10 footage. I don't understand the point of that. Do you have  
11 some reason to want to play both the footage

12 MR. YALOWITZ: No, I'm not going to play both. Trust  
13 me, we're not going to watch hours of irrelevant video. I told  
14 you, I have been doing this a long time. I'm not going to  
15 screw it up.

16 THE COURT: I certainly hope not.

17 MR. YALOWITZ: And you're not going to let me.

18 THE COURT: Indeed, I wouldn't let either side.

19 MR. YALOWITZ: And I'm not going to let you screw it  
20 up.

21 THE COURT: I hope not.

22 All right. Inflammatory rhetoric. You know, you have  
23 not had an opportunity, I'll just put it that way, yet, to  
24 respond to stuff about the newspaper Articles and that sort of  
25 thing.

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1 MR. YALOWITZ: You mean the stuff that came in after  
2 the close of business last night?

3 THE COURT: Yeah.

4 MR. YALOWITZ: Yeah, I have not had an opportunity to  
5 read that, right.

6 THE COURT: You can respond to that, but I can give  
7 you my general --

8 MR. YALOWITZ: That's great.

9 THE COURT: -- view. In the abstract, that newspaper  
10 article, unless you are offering a quotation, word for word,  
11 from a representative of the PA and the PLO, newspaper articles  
12 about what they think is going on over in the Middle East are  
13 not particularly probative or admissible. I couldn't care less  
14 what Time Magazine thinks, or what the BBC thinks is going on.

15 MR. YALOWITZ: Well, the BBC has, for example, video  
16 of Arafat, so I want to show video of Arafat.

17 THE COURT: As I said, that may or may not fall into  
18 the category that I just gave you. I have not seen it. So if  
19 there is a statement by Yasser Arafat that you believe is a  
20 statement to be attributed to the PA or PLO, and that statement  
21 is evidence of an element of the claim that you have brought  
22 here, then it is a statement by the defendants, admission by  
23 defendants, and it is admissible.

24 MR. YALOWITZ: Thank you.

25 THE COURT: But just the characterization by some

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1 reporter, or the opinion of some reporter, about what is going  
2 on, I don't see how any of that --

3 MR. YALOWITZ: Well, that's not going to happen.

4 THE COURT: All right.

5 MR. HILL: There is a large volume of these materials.  
6 Could the plaintiffs be directed to identify the particular  
7 statements they are planning to offer so we can raise it with  
8 the Court if we have any issues?

9 THE COURT: Well, I don't know, I mean --

10 MR. YALOWITZ: That's just busy work, your Honor. I'm  
11 really trying to get my witnesses ready. I'm trying to get my  
12 opening ready. We have done so much busy work for these --

13 THE COURT: The only thing I'm going to say is that I  
14 would suggest that you identify with them as specifically as  
15 possible what you intend to offer --

16 MR. YALOWITZ: And let me just say another thing, your  
17 Honor.

18 THE COURT: -- because I'm not going to spend a lot of  
19 time. I would say there is a basic rule of trying a case. You  
20 give me 30 seconds to make a decision, you are going to get 30  
21 seconds worth of thought.

22 MR. YALOWITZ: I agree.

23 THE COURT: If you give me a week to make this  
24 decision, I might say you are going get a week's worth of  
25 thought, but at least you will get a more thoughtful response.

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1 I'm not going to spend any time arguing about why they didn't  
2 know you were getting ready to offer this portion of this text.  
3 And that rule goes for both sides. So you'd better be real  
4 clear about what it is that you think you are going to offer,  
5 and real clear that it is not a surprise to the other side.

6 MR. YALOWITZ: Let me just say, your Honor, I invited  
7 the defendants to my office months ago. And they rebuffed it.  
8 I was prepared to sit with them well in advance of trial and  
9 talk through every exhibit. And they told me to buzz off.

10 THE COURT: All right.

11 MR. YALOWITZ: So for them to sit around, now, and  
12 say, oh, it's unfair surprise, I was ready to be transparent  
13 with them. And they rejected the offer. So I'm fully prepared  
14 to -- you know, I have looked at my evidence. I have sent  
15 thing to you that I think may be an issue I want to get before  
16 you. But I'm not going to sit there, now, and go through,  
17 exhibit by exhibit, on a blanket basis --

18 THE COURT: The only thing that I'm going to evaluate  
19 at the time is whether or not, in fairness, there is any reason  
20 not to let you go forward simply because they now argue  
21 surprise.

22 MR. YALOWITZ: I understand.

23 THE COURT: So you make your own judgment about  
24 whether or not it is reasonable, logical, and fairly clear to  
25 them what it is that you would want out of these articles or

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1 these things you intend to offer. Because I'm not going to  
2 spend a lot of time, in the middle of the trial spending the  
3 jury's time, having to go through, word for word, articles.

4 MR. YALOWITZ: I agree.

5 THE COURT: I'm going to ask you a very simple  
6 question. Show me the language that you want to put in front  
7 of this jury, show me the language that you don't want in front  
8 of this jury, and tell me why. And then I'm going to rule and  
9 we'll move on.

10 MR. YALOWITZ: Good.

11 THE COURT: If I even bother to ask that.

12 All right.

13 MR. ROCHON: The only thing we offer on that issue is  
14 Mr. Yalowitz has said, we've talked about videos. And there at  
15 least you know who is making the statement. The newspaper  
16 articles, no matter if they have got quotation marks around it  
17 and it's coming from the PA employee of all time, allegedly, it  
18 is just a newspaper article that cannot establish the person  
19 who said it. Newspaper articles, it will not come as a great  
20 surprise, frequently misquote people, and not a way to prove  
21 what a person said. If the Court gives that additional  
22 guidance, then Mr. Yalowitz will be on notice, right now. I'm  
23 concerned he can still put in a newspaper article because it  
24 purports to quote Yasser Arafat.

25 THE COURT: Well, you are right, that is not the rule.

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1 And he's required to lay a proper foundation for its  
2 admissibility. Now, whether he can or cannot is a different  
3 question.

4 MR. ROCHON: Agreed.

5 THE COURT: But, you know, I can't deal with that  
6 issue. If somebody wants to -- you know, I mean there are a  
7 number of different ways to do this. Somebody can say they  
8 heard him say it. Somebody can say they heard him say it on  
9 that occasion. Or heard them saying it many times in the past.  
10 Or there can be some reason why it is clear that, from the  
11 context, that the statement is a reliable statement. I don't  
12 know. I don't know about the foundation.

13 But, in general, my position is that nothing short of  
14 direct quotations from representatives of the defendant that  
15 you are attributing to them as admissions, is admissible.  
16 Unless you give me some other reason why I care, as they say,  
17 Time Magazine, or the jury should care that Time Magazine, to  
18 the extent that the statements are presented in a way that  
19 there is reliability to the fact that the person made the  
20 statement. And I can rule on whether or not I think this is  
21 sufficient basis for reliability to come into evidence.

22 So if there is some critical statement that you want  
23 in, Mr. Yalowitz, and you want to know very early on whether  
24 you are going to get that in, then I suggest that you do  
25 discuss it with the other side to see if they are going to

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1 fight about it, so that you could be prepared to give me a  
2 convincing argument of why it should go in, and why it should  
3 go in in the form that you say it should go in.

4 MR. YALOWITZ: Let me give you three thoughts on that,  
5 your Honor.

6 First of all, there is no more "very early on."

7 Second of all, I am assured that whatever I say to the  
8 defendants, they will object to everything I do.

9 Third of all, I know the rule. I am not gonna offer  
10 newspaper articles for the truth. There may be some other  
11 reason we want a newspaper article. It may be that a guy is  
12 quoted saying I'm a terrorist and I'm proud of it. And then  
13 you wonder, well, why does his employer keep him on the  
14 payroll. He is out in public and they are on record notice  
15 talking about how -- he is on the record talking about how he  
16 is a terrorist and they keep him on the payroll. That may be  
17 admissible for notice. But I don't really -- I am not offering  
18 statements like that for the truth.

19 MR. ROCHON: Well, your Honor, I guess I know Mr.  
20 Yalowitz said the rule of admissibility, as he knows the rules.  
21 But the notion that you get to put in a newspaper article, not  
22 for the truth because someone's supposedly said something  
23 there. And from that, you are supposed to infer that other  
24 people read it and are on notice of it, suggests that we need  
25 your help, not relying on Mr. Yalowitz for the rules of



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1 evidence here. Because that should not come in.

2 MR. YALOWITZ: Oh, please.

3 THE COURT: Look --

4 MR. YALOWITZ: Your Honor, this is going to be a very  
5 long trial if there is going to be personal sniping like this.

6 THE COURT: No, it's not going to be a very long trial  
7 because of personal sniping. The bottom line is, look, I can't  
8 rule until I see it, and I see it in context.

9 MR. YALOWITZ: Right.

10 THE COURT: Until you present it to me, and tell me  
11 what context you want it, I'm not going to rule. But I'm  
12 telling you, now, this is very helpful to me, because I know  
13 the various possibilities here. And I know what my reactions  
14 are to various possibilities. And I can tell you, right now,  
15 just because something is in a newspaper article, doesn't  
16 necessarily follow that you have gotten it admitted in evidence  
17 as to notice, if there is no reasonable way for anybody to  
18 conclude that the person sitting in the West Bank that you want  
19 to say had notice, happened to turn on BBC that day and see the  
20 broadcast.

21 MR. YALOWITZ: I agree. You have to contextualize it,  
22 you have to understand why it is germane, and why a jury could  
23 reasonably infer that they got notice from it.

24 THE COURT: All right.

25 MR. YALOWITZ: I understand that.

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1 THE COURT: All right.

2 MR. ROCHON: Well, your Honor, just so it is clear, we  
3 are objecting --

4 MR. YALOWITZ: I took evidence from Judge Weinstein, I  
5 still remember it.

6 MR. ROCHON: I don't know what grade he got, but it  
7 was a while ago.

8 MR. YALOWITZ: I got an E.

9 MR. ROCHON: Evidence. For evidence.

10 MR. YALOWITZ: What did you get?

11 MR. ROCHON: Your Honor, we object to any evidence  
12 coming in, of these statements, supposedly not for the truth  
13 because they give notice, unless we get -- we're objecting to  
14 that.

15 THE COURT: All right.

16 MR. ROCHON: And I know Mr. Yalowitz says we are  
17 slippery and all that. We have got a thousand exhibits. He  
18 has not yanked one since you started giving your preliminary  
19 rulings. We got a list yesterday that's the same list all  
20 along. So how are we supposed to know what he's going to use  
21 or not. You have already given a lot of indication as to what  
22 is in or not. It has not changed the exhibit list yet.

23 THE COURT: So he's still going to try to get it in.

24 MR. ROCHON: Well, if he is, in the face of what you  
25 have said, he ought to put us on notice and let us argue it

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1 with you. He says it is gonna be a long trial. We are not  
2 going to waste the jury's time if we can get through this now  
3 and he's got some clear instructions that he is not going to be  
4 able to put in prejudicial statement, saying, oh, it's not for  
5 the truth, the oldest trick in the book and then say, oh, it is  
6 for notice. I have been dealing with this not for the truth,  
7 it's prejudicial for 30 years. Everybody pulls the, *it is not*  
8 *for the truth*, when in fact we all know it is a damaging  
9 statement and the most likely interpretation of it is for the  
10 truth. So we need to get some clarity here.

11 THE COURT: This is the ruling that I'm going to  
12 impose, and I impose in cases where I have lawyers who can't  
13 resolve this on their own.

14 I want the other side to have a list, the day before,  
15 of every exhibit that you intend to offer in evidence the next  
16 day. That is going to be the rule in this trial for both  
17 sides. If they have not seen it at least the day before, then  
18 it is not coming in by that ruling, okay. Very simple. So my  
19 suggestion is that you get it to them early, and you make sure  
20 that they have it, and you make sure that they know exactly  
21 what is the accurate list. And if I find that you are giving  
22 them a list of a thousand exhibits the day before and you are  
23 using 10, then I'm going to consider that that is an abuse of  
24 the process, and I'm going to think about imposing some  
25 sanctions. So let's be reasonable about this. As you can

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1 understand, we are at the point where there is no more guessing  
2 and theorizing about this. It is time to make up your mind  
3 about what evidence you can reasonably get in before this jury  
4 and what you are going to ask the jury to determine.

5 So you should be ready a week from today to know  
6 exactly what exhibits you are putting before the jury and how  
7 you are going to argue the case, coupled with the guidance that  
8 I'm trying to give you, now, with regard to these other issues,  
9 and then we'll take a short break.

10 Let me just go to -- I think there was -- remind me.  
11 Let me come back. We were supposed to come back to the eight  
12 exhibits.

13 MR. ROCHON: Right, eight.

14 THE COURT: Let's go back to that. The statements  
15 that I looked at, and I guess I'm looking at the January 5th  
16 letter from the defendant. Is that the quotations that you  
17 were talking about.

18 MR. SATIN: Yes, this is our exhibits that they have  
19 proffered to the Court.

20 THE COURT: My reaction is this. Let me just  
21 basically go through your bullet points.

22 (Continued on next page)  
23  
24  
25

F16SSOK3

1 THE COURT: Beginning with the first bullet point, I  
2 don't have any problems with, I have no regrets. I don't have  
3 any problems with, from the second bullet point, I am proud of  
4 the acts I have committed and that is a just reason for my  
5 having done them. On the next bullet point, I have no problem  
6 with, I do not regret my actions. On the next bullet point, I  
7 have no problems with, I do not regret any of the acts that I  
8 have carried out. On the next bullet point, I have no problems  
9 with, I was the organizer of five suicide terrorist attacks and  
10 it is an honor for me to defend my people. I do not regret my  
11 actions.

12 I have no problems with those statements. I have no  
13 problems with, I would ask the court to judge me as a person  
14 and not as its enemy. Ultimately, I made no mistakes. The  
15 last bullet point, I don't have any problems with any of it, I  
16 made a mistake and I regret that I did it, but the part that I  
17 did, I admit, but what I did is part of what I carried out  
18 without thinking of the consequences and I hope it will be  
19 clear to everyone that when I reached a mature age, I thought  
20 about my actions and saw that the actions that I had performed  
21 were violent and bad actions against humanity. I don't have  
22 any problems with that.

23 Do you have any problems with any of that.

24 MR. SATIN: We do, your Honor.

25 THE COURT: What that I just quoted do you have a

F16SSOK3

1 problem with?

2 MR. SATIN: The statements, I have no regrets, I am  
3 proud, all the statements you just read are general statements.  
4 They're not linked to any specific offenses. This jury will  
5 know by that point in the presentation of evidence that these  
6 people have been convicted of these crimes already.

7 THE COURT: They will know what crimes that they are  
8 referring to.

9 MR. SATIN: But it doesn't further their case at all.

10 THE COURT: What is your prejudice? I don't  
11 understand what your prejudice is. You don't want them to say  
12 I regret it, I don't regret it? I am not sure what it is that  
13 you don't want the jury to hear and why.

14 MR. SATIN: Well, those statements don't show any  
15 liability on the part of the PA and PLO. They want to admit  
16 the fact of the conviction to --

17 THE COURT: What don't you want the jury to hear? If  
18 they are worthless, that is not a good argument. Why do you  
19 think it hurts you? Why don't you want the jury to hear it?

20 MR. SATIN: Because it dehumanizes even further the  
21 people who have committed these crimes.

22 THE COURT: So don't ask them.

23 MR. SATIN: By association with those individuals, it  
24 draws prejudice to the defense. There is no probative value,  
25 because the facts that they were convicted of is already in

F16SSOK3

1 front of the jury.

2 THE COURT: All right.

3 MR. SATIN: That is sort of the relevant prejudice  
4 issue. There is also this issue of does it fall under a  
5 hearsay exception. The only one proffered to the court is the  
6 statement against penal interest.

7 THE COURT: What part of this are you claiming is  
8 hearsay?

9 MR. SATIN: I have no regrets. It is a hearsay  
10 statement of --

11 THE COURT: It is not. You have got to go back to  
12 hearsay 101 with respect to that. It is not a statement  
13 offered for the truth of the content of the statement. It is  
14 not asserting a fact that can be independently proven. It is a  
15 feeling. A present sense impression by the person.

16 I either regret it or I don't regret it. It is not  
17 like I was in New Jersey on Tuesday. That is a statement  
18 offered for the truth of the out-of-court assertion. I don't  
19 regret it is not hearsay. You need to give me a different  
20 argument.

21 MR. SATIN: Couple things on that. A state of mind of  
22 those individuals who made those statements isn't at issue in  
23 this case. That does not advance the liability, doesn't  
24 advance the plaintiff's case against the defendants, either the  
25 PA or PLO. The state-of-mind exception, to the extent it falls

F16SSOK3

1 within that, can only be applicable if state of mind is  
2 relevant to the ultimate question for the jury and it is not.

3 THE COURT: The problem I have with that argument is  
4 that the state of mind of the defendants is at issue and it may  
5 or may not -- I don't know the context of each one of these  
6 statements -- it may or may not be relevant that particularly,  
7 if payments are made by the defendants to these individuals  
8 after they have made these statements, that one could infer  
9 that it reflects a state of mind of the defendant as well as a  
10 state of mind of the speaker.

11 MR. SATIN: Then the admissibility of this statement  
12 would have to be conditionally relevant upon a witness coming  
13 into this courtroom and say, I was aware that this person made  
14 this statement, which is found in a Hebrew language military  
15 court record that is not, in fact, open to the public. They  
16 don't have that person. So to the extent it is relevant upon  
17 that proof, if just doesn't exist in this case.

18 THE COURT: Mr. Yalowitz, what is the purpose?

19 MR. YALOWITZ: The purpose of this is to, first of  
20 all, on vicarious liability, the state of mind of the shooters  
21 and the conspirators is relevant. The state of mind of those  
22 people is imputed. In addition, the defendants have said,  
23 Mr. Satin has said he is going to attack the reliability of  
24 these convictions. He is going to say, oh, you can't count on  
25 these convictions. Maybe they weren't good convictions.



F16SSOK3

1           If the defendant at the end of the proceedings stands  
2 up and says, I have no regrets, if I could have killed more  
3 Jews, I would. That sounds like a guy who is guilty and the  
4 jury ought to be able to hear that. Not just I have no  
5 regrets, but if I could have killed more Jews, I would.

6           THE COURT: But you are making an argument based on  
7 what you think that they're going to attack. Suppose they  
8 don't attack it.

9           MR. YALOWITZ: He said that last -- okay.

10          THE COURT: That is fine and dandy. But quite  
11 frankly, I think logically, at least where I sit, it is not  
12 going to be their most persuasive argument to sit up here and  
13 try to defend the people convicted of these terror acts. If  
14 that is the theory and defense, that's fine. I doubt that is  
15 what the jury is really going to be talking about in the jury  
16 room afterwards.

17          MR. ROCHON: It will not be our theory.

18          THE COURT: Excuse me?

19          MR. ROCHON: It will not be our theory.

20          THE COURT: I didn't think so.

21          MR. YALOWITZ: Wait a minute. Wait a minute. They  
22 have got a guy named Michael Sfard on their witness list. As  
23 of yesterday, it was their theory. If they will represent --

24          THE COURT: It may still be their theory. You really  
25 think they are going to go pretty far with that?

F16SSOK3

1 MR. YALOWITZ: I don't think you're going to let them.

2 THE COURT: Even if I let them, do you think --

3 MR. ROCHON: I can help Mr. Yalowitz, because if you  
4 allow the convictions in, and you have said you will, we are  
5 not going to attack the Israeli military tribunal system once  
6 you ruled these convictions are admissible.

7 THE COURT: I thought we already had this discussion.

8 MR. ROCHON: We already lost that. Mr. Sfard is  
9 unlikely to testify at this trial.

10 MR. YALOWITZ: Why is he on the witness list?

11 MR. ROCHON: The same reason Mr. Yalowitz has a lot of  
12 people not testifying in this case. You never know. I am not  
13 going to be accused of not listing him. I'm sure he won't call  
14 off his people either.

15 THE COURT: Before we finish that, let me just veer  
16 back off on another issue. Not only do I want you to make sure  
17 that you tell the other side what the exhibits are for the next  
18 day, I want you to tell the other side what are the likely  
19 witnesses for the next day.

20 MR. ROCHON: Can we do --

21 MR. YALOWITZ: That's fine.

22 MR. ROCHON: I apologize, your Honor. Can we do --

23 THE COURT: If it is less, you should tell them  
24 minimally who are the next witnesses for the next day, if you  
25 anticipate they'll be more than three witnesses. If you don't

F16SSOK3

1 anticipate there is going to be more than three witnesses, you  
2 should tell them what you anticipate the next three witnesses  
3 to be.

4 MR. YALOWITZ: Fine. We can do a rolling three  
5 witness ahead.

6 THE COURT: Right.

7 MR. YALOWITZ: That's fine.

8 MR. ROCHON: We would like to have more advanced  
9 notice. Maybe two, three days' notice of when witnesses are  
10 coming up. They have a lot of witnesses on their list. They  
11 have the right to call them in the order they prefer. I am not  
12 trying to limit that. Because the day before can be 5:00  
13 o'clock, testifying the next day, and in order to prepare for  
14 the next day's trial and anticipate objections and not to  
15 unduly inconvenience the jury, even three days before who they  
16 are going to call. Not the exhibits, but who they are going to  
17 call would be helpful to moving this trial along.

18 We had an exchange of letters talking about doing this  
19 a week in advance, and I don't need a week notice, but three  
20 days to allow each side to prepare. We will give the same to  
21 the other side. If they know if Mr. Sfard suddenly be called  
22 anyway, they have plenty of time.

23 MR. YALOWITZ: I am fine with --

24 THE COURT: What do you want to do?

25 MR. YALOWITZ: I am fine with more than a day.

F16SSOK3

1 THE COURT: What are you fine with?

2 MR. YALOWITZ: I am just trying to think it through.

3 THE COURT: What do you want? They have to give you  
4 notice.

5 MR. YALOWITZ: I tried to work it out with them.

6 THE COURT: I didn't ask you to work it out. I said,  
7 what do you want?

8 MR. YALOWITZ: I will take 72 hours. 72 hours is  
9 fine.

10 MR. ROCHON: Deal.

11 THE COURT: That solves that problem.

12 MR. YALOWITZ: Amazing how agreeable people get when  
13 they step in the courtroom.

14 THE COURT: Now, I don't quite see the relevance of  
15 these statements, because I don't have the context or the time  
16 frame for these statements in relationship to what you say is  
17 relevant to the jury's determination. What I get from this is  
18 you just want to show the jury that they are not sorry.

19 MR. YALOWITZ: Not just that they're not sorry, but  
20 that they did it for political purposes.

21 THE COURT: Where does it say they --

22 MR. YALOWITZ: If I could have killed more Jews, I  
23 would have.

24 THE COURT: What makes you think that is political as  
25 opposed to religion as opposed to territorial as opposed --

F16SSOK3

1 MR. YALOWITZ: It is territorial. Their political  
2 objective.

3 THE COURT: Do you think that is going to be a  
4 surprise to a jury in this box?

5 MR. YALOWITZ: I think it is evidence I am entitled to  
6 give to the jury that the employees of the defendant who are on  
7 their payroll said in open court, I don't regret this, and if I  
8 could have killed more, I would have. If you want to redact  
9 the word Jews to avoid some prejudice, if you release me, I am  
10 going to go for my weapons and these are people who are still  
11 on the payroll. This really goes to the state of mind of the  
12 defendants.

13 THE COURT: Where are you taking these statements  
14 from?

15 MR. YALOWITZ: From the transcripts of their hearing  
16 immediately before they were sentenced. It is not just that  
17 they don't regret it. It goes to the state of mind of the  
18 defendants. It goes to the appearance of intent, to do these  
19 things to commit these crimes in order to coerce a civilian  
20 population or intimidate a government, coerce or intimidate  
21 civilian population for a government or influence the policy of  
22 the government: I have got to prove every element of my case  
23 here.

24 THE COURT: My view at this point is still the same as  
25 what it was when I read this. I don't agree with the defense

F16SSOK3

1 and I don't agree with you. I don't think the statements that  
2 I read are particularly prejudicial, but I don't think that  
3 statements, as you want them completely, is more probative of  
4 anything than prejudicial.

5 The statements about giving @Sharom the death  
6 sentence, I don't know why you can possibly argue that that is  
7 somehow relevant to committing a terrorist act because the  
8 person says that Sharom should get the death sentence.

9 MR. YALOWITZ: If you had a guy in the U.S. Marshal's  
10 office who killed a bunch of civilians and made statements like  
11 this in front of his sentencing, you wouldn't want that guy on  
12 the payroll of the marshals while he was in jail. If the  
13 marshals had a policy of keeping guys like that on the payroll,  
14 that would say something about whether they approved of his  
15 actions. That would say something about whether, in the scope  
16 of his employment, he thought it was okay to do stuff like  
17 that, particularly when there is a whole pattern of guys like  
18 that. That's why I want that evidence before the jury.

19 THE COURT: Well, it seems to me that you're making an  
20 argument that is over-shadowed by stronger evidence.

21 MR. YALOWITZ: I understand your views.

22 THE COURT: You are telling me that I shouldn't want a  
23 person who would make these statements, as opposed to I  
24 shouldn't want a person who has just gone out and killed a  
25 bunch of innocent people?

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1 MR. YALOWITZ: Because it is worse.

2 THE COURT: That is the only thing I hear you saying.

3 MR. YALOWITZ: It's worse.

4 THE COURT: It's worse?

5 MR. YALOWITZ: You bet that.

6 THE COURT: It is worse because they don't regret it?

7 MR. YALOWITZ: Right.

8 THE COURT: Why it is worse because he says that  
9 Sharom should be given the death sentence?

10 MR. YALOWITZ: I don't know the jury is going to know  
11 who Sharom is anyway. You give me some of the other things. I  
12 don't need Sharom in that sense.

13 THE COURT: If I could have murdered more Jews, I  
14 would not hesitate?

15 MR. YALOWITZ: That is a guy that they're rewarding.

16 THE COURT: They are not rewarding him for that  
17 statement. By your theory, they were rewarding him for  
18 committing a terrorist act. That's the only relevant thing to  
19 this jury. Quite frankly, even if they were rewarding him for  
20 that statement, that wouldn't be the claim here.

21 MR. YALOWITZ: Right. But it is a statement in the  
22 context of pleading guilty or dealing with a sentence post  
23 trial.

24 THE COURT: My view is this, if you want statements  
25 about their feelings about what the crimes that they committed

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1 and what they did, and as I say, I don't regret it, I'm proud  
2 of it, I was the organizer of terrorist acts, that's fine.  
3 That is consistent with the conviction and that is consistent  
4 with the statements that were already admitted against the  
5 person's penal interest.

6 MR. YALOWITZ: All right.

7 THE COURT: Simply, as they say, the one thing I have  
8 got to be sensitive in this case is I don't want either side to  
9 simply try to whip up the emotions of the jury on issues that  
10 are not substantive. I have to be very careful about that. It  
11 is a delicate balance to reach in terms of gruesome  
12 photographs, in terms of outrageous statements, hateful  
13 statements, or political views.

14 MR. YALOWITZ: I understand that the court is  
15 sensitive to that. I respect it. You can't handcuff me too  
16 tight on these things.

17 THE COURT: I am not. I think I am giving you great  
18 leeway. I am trying to keep you focused on what I am going to  
19 focus this jury. This jury is going to simply decide whether  
20 or not there is enough evidence in this case to demonstrate the  
21 PA and/or the PLO's involvement in the terrorist acts that they  
22 claim that they were injured in as a result of and what is  
23 reasonable compensation to them for the injuries that were  
24 suffered. That is the issue.

25 It is not because somebody is a bad person, it is not



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1 because they did it and it is so outrageous that you could  
2 really want to be associated with this kind of person. It is  
3 none of that. Is it evidence that they were involved in the  
4 attack. And as we had this discussion before, it is not even  
5 after they did it, I said, good job. That doesn't prove your  
6 case. What proves your case is that they had involvement in  
7 these activities either before or during these acts of  
8 violence.

9 MR. YALOWITZ: That is true on vicarious liability.  
10 First of all, you do have ratification. If you have got an  
11 employee, you and I know if you have an employee who you have a  
12 prior association with -- you and I talked about this.

13 THE COURT: Right.

14 MR. YALOWITZ: I am not saying somebody off the street  
15 away from you. You have a prior association with this person.  
16 They are your agent. They are your employee.

17 THE COURT: It is the prior association. It is clear.

18 MR. YALOWITZ: Right. They do something away from you  
19 and you learn about it --

20 THE COURT: Right.

21 MR. YALOWITZ: -- and you say, good job, here is some  
22 money, and you have a policy of doing that, that suggests  
23 ratification. If you have knowledge of the facts, the jury is  
24 entitled to conclude that is ratification. We talked about  
25 that.

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1 THE COURT: But they're entitled to conclude that  
2 based on what acts you took to reward the person --

3 MR. YALOWITZ: Correct.

4 THE COURT: -- for the violent activity.

5 MR. YALOWITZ: Correct.

6 THE COURT: Not for how he felt about the violent  
7 activity.

8 MR. YALOWITZ: I accept that. I accept that.

9 THE COURT: He can praise him as much as he wants, as  
10 long as he is not approving of, condoning, or encouraging him  
11 to commit the act that he committed.

12 MR. YALOWITZ: I didn't understand that last part.

13 THE COURT: I said he can praise him as much as he  
14 wants for the act, if he agrees with the act, as long as he is  
15 not adopting, condoning, approving of, or encouraging that  
16 person to take that act.

17 MR. YALOWITZ: I think I understand that, but if there  
18 is a prior association, I think we agree if there is a prior  
19 association and the employer has knowledge of the act --

20 THE COURT: Right.

21 MR. YALOWITZ: -- and through words and actions  
22 indicates approval --

23 THE COURT: Right.

24 MR. YALOWITZ: -- then the jury is entitled to find  
25 that the employer has adopted that act.

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1 THE COURT: That may be true, but it has nothing to do  
2 with the statements you just gave me.

3 MR. YALOWITZ: We agree on that.

4 THE COURT: That has nothing to do with the statements  
5 you say you want to offer about, oh, I should have killed more  
6 Jews.

7 MR. YALOWITZ: We agree on that.

8 THE COURT: That is not part of the element of this  
9 claim. I will give you some of this, if you want some of this.

10 MR. YALOWITZ: I do. I want all of it. I will take  
11 what you give me.

12 THE COURT: I know you want all of it, but I don't see  
13 that there is a particularly strong, valid objection to the  
14 person who is convicted of the offense to say, I have no  
15 regrets, that somehow that that is in admissible.

16 MR. YALOWITZ: Did I miss the court's ruling on the  
17 last bullet in the beginning?

18 THE COURT: In the beginning?

19 MR. YALOWITZ: It starts in the beginning.

20 THE COURT: Yes. It is on the second page?

21 MR. YALOWITZ: Yes.

22 THE COURT: My position was I didn't have a problem  
23 with, I was the organizer of five suicide terrorist attacks.

24 MR. YALOWITZ: I'm sorry, just above two, sort of  
25 through the bottom third of the page.

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1 MR. ROCHON: In the beginning.

2 MR. YALOWITZ: It is not in the beginning of the  
3 document. The words of the statement are in the beginning.

4 THE COURT: I see. I am not quite sure what he is  
5 talking about. It was difficult for me to understand what he  
6 was trying to say.

7 MR. YALOWITZ: This was a guy who was convicted of not  
8 reporting an impending terror attack.

9 THE COURT: What does that have to do with this case?  
10 You're not saying he was rewarded for not reporting it, that  
11 could make out your claim?

12 MR. YALOWITZ: No. It is his state of mind of why he  
13 didn't report it. State of mind of why he didn't report it is,  
14 if I had reported it to the Palestinian authority, they would  
15 have killed me, that is why I didn't report it. It goes to his  
16 state of mind.

17 THE COURT: I'm sorry, where does it say that?

18 MR. YALOWITZ: Right toward the bottom. As we hear  
19 every day, this would have meant a death penalty for me from  
20 the authority or the resistance people.

21 THE COURT: I see. What fact does that establish?

22 MR. YALOWITZ: It goes to the issue of their control,  
23 their approval of terror of this attack.

24 THE COURT: This is not their statement.

25 MR. YALOWITZ: It is a person convicted of not

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1 reporting a terror attack in which their employees  
2 participated.

3 THE COURT: His opinion is, I didn't do it because if  
4 I did, I thought that they would kill me?

5 MR. YALOWITZ: I didn't report it because they would  
6 have killed me.

7 THE COURT: How is that a credible fact, that if he  
8 hadn't reported it, they would have killed him, or that is an  
9 accurate assessment by him of what he thought might happen,  
10 that would, in fact, happen?

11 MR. YALOWITZ: Who would know better than him? He is  
12 there living in the West Bank.

13 THE COURT: I don't know how he would know.

14 MR. YALOWITZ: He would know because one of the  
15 perpetrators was in his house planning the attack.

16 THE COURT: You want to offer this person's statement  
17 for the conclusion, for the jury to draw their conclusion that  
18 they communicated to people that if they --

19 MR. YALOWITZ: If they reported on impending terror  
20 attacks.

21 THE COURT: That the PA would have killed them?

22 MR. YALOWITZ: Right. The PA or the resistance  
23 people.

24 THE COURT: How does he know this?

25 MR. YALOWITZ: Who would know better than him? He was

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1 living with one of the convicted individuals.

2 THE COURT: You say who would know better than  
3 somebody who was in a conversation where somebody in the PA  
4 said, I am going to kill you if you do X? Why is this reliable  
5 at all as a factual statement?

6 MR. YALOWITZ: I think a guy who comes to court  
7 admitting that he didn't report a terror attack and explains  
8 why is a pretty credible source for why he didn't report a  
9 crime.

10 THE COURT: Because he thought he was going to be  
11 killed?

12 MR. YALOWITZ: Because he thought he was going to be  
13 killed.

14 THE COURT: What he thought doesn't make it a fact.  
15 He doesn't say, They told me they were going to kill me.

16 MR. YALOWITZ: I think it is a reasonable inference  
17 that the jury could draw.

18 THE COURT: Well, it is several layers of hearsay.

19 MR. YALOWITZ: I don't think it is hearsay. I think  
20 he is admitting his culpability.

21 THE COURT: He was admitting culpability. That's not  
22 what you're offering this for. You're offering this for the  
23 jury to conclude that, if he had said this, that the PA  
24 directed to kill him.

25 MR. YALOWITZ: That he had a reasonable fear.

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1 THE COURT: The only way he could have a reasonable  
2 fear is if they put that fear in him.

3 MR. YALOWITZ: I am sure he didn't make it up.

4 THE COURT: You're sure he didn't make it up. The  
5 other side is not so sure that he didn't make it up.

6 MR. YALOWITZ: They are pretty sure too, but they  
7 won't admit it. They are pretty sure too.

8 THE COURT: I think I understand why you want to offer  
9 it. I don't think it is admissible for that purpose.

10 MR. YALOWITZ: All right.

11 MR. SATIN: Your Honor, can I revisit one little  
12 piece? I am not going to reargue what the court has ruled.

13 THE COURT: Sure.

14 MR. SATIN: I understand the court has ruled that the  
15 statements, I am proud of it, I don't regret it, comes in, is  
16 that correct?

17 THE COURT: Yes.

18 MR. SATIN: On the top of page 2, the second bullet  
19 point from the bottom from the top starts, I was the organizer.

20 THE COURT: Right.

21 MR. SATIN: The sentence that the court had said was  
22 admissible, the first sentence, I was the organizer of five  
23 suicide terror attacks and it is an honor for me to defend my  
24 people. The court's ruling would be the first part of that  
25 statement where he says, I was the organizer, but it is an

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1 honor for me to defend my people is not. We would ask the  
2 court, consistent with its ruling, not allow in that second  
3 part after the comma.

4 THE COURT: Again, I don't understand the nature --  
5 let's put it this way. Let me articulate it this way. Why  
6 wouldn't you want the jury to hear that?

7 MR. ROCHON: We do not.

8 THE COURT: Why do you not want the jury to hear that?  
9 What are you afraid that they are going to inappropriately  
10 conclude?

11 MR. SATIN: We would think that they might or they  
12 would infer that he was saying that I am a part of the  
13 government or part of this entity doing it on their behalf.

14 THE COURT: That's not what it says. It says he did  
15 it to defend his people.

16 MR. SATIN: A lot of people might associate someone  
17 saying, I did it on behalf of people, as though a government  
18 represents people. That is the inference that could be drawn  
19 from it.

20 THE COURT: He is saying he is doing it on behalf of  
21 the Palestinian people. Isn't that the only inference?

22 MR. SATIN: Except that we represent an entity that  
23 represents the Palestinian people. That inference could be  
24 drawn by that.

25 THE COURT: No. If I say I am doing this as an



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1 American, it doesn't mean that President Obama told me to do  
2 it. That doesn't follow at all. That is not what he says. He  
3 says, I am doing this for the Palestinian authority. He says,  
4 I am doing it for my people; not their people or someone else's  
5 people, not my government, not their government. I am doing it  
6 for my people.

7 I think it is common sense reading, any jury is going  
8 to say that makes sense. We know that is the view of a lot of  
9 people who are involved in activities over there, that they  
10 believe that they're defending their people, their homeland,  
11 their family, their friends. What does that got to do with the  
12 PA?

13 MR. SATIN: Were that to be the case that he did it as  
14 an honor to defend his people, that does not advance their  
15 case. If the reason the court is letting it in, I was the  
16 organizer of the attacks, as evidence that he did it, to I  
17 suppose preempt the defense, even though we said we won't  
18 challenge the reliability of those convictions, the fact of why  
19 this person did it is irrelevant. It doesn't matter why he did  
20 it. What is important is the purposes of the presentation to  
21 the jury is whether he did it.

22 THE COURT: I don't think my view has changed. I will  
23 consider it further. Again, be careful what you ask for. You  
24 may get it. I'm not sure why this hurts you. This is not  
25 something that would be unexpected for a jury to hear. The

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1 jury would be surprised if someone didn't say this. That is  
2 exactly what they think is in many jurors' minds is the nature  
3 of the Israeli-Palestinian conflict.

4 Both sides have strong views and they think that  
5 they're representing and doing for their people, their  
6 community, their friends and family and relatives. It would be  
7 one thing if he said he was doing it for money. He says, I am  
8 doing it for my people. I think he has an honorable reason why  
9 he is taking these acts. That doesn't infer anything about the  
10 PA or the PLO, unless they make some other connection. I will  
11 think about it.

12 MR. ROCHON: One of our concerns on these things is  
13 that they're being introduced as declarations against penal  
14 interest, we understand that. These are not mostly employees  
15 of the PA.

16 THE COURT: I understand.

17 MR. ROCHON: So the PA doesn't want these statements  
18 attributed to it for those purposes because we are not  
19 defending these actions. I don't want Mr. Yalowitz --

20 THE COURT: I understand.

21 MR. ROCHON: -- or the plaintiff's time to stand up  
22 and say this guy said it was an honor to defend our people,  
23 that our defense theory on behalf of our clients is defending  
24 these actions?

25 THE COURT: I understand that. Look, I have tried a

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1 lot of cases. I will give you appropriate leeway to try the  
2 case the way you think you want to try it. If I was trying the  
3 case and that was the issue of I was confronted with, ladies  
4 and gentlemen, he didn't say he did this for the Palestinian  
5 Liberation Organization or the business for the PA. He said he  
6 did this for his people.

7 When you want to agree with it or disagree with what  
8 he thinks is a principle stand, he is not accusing us. He is  
9 saying he made an independent judgment to do this because this  
10 is what he believes. That is what I would say to a jury and  
11 they would say, you know what, that makes a lot of sense to me.

12 I think it is time for the parties to start to  
13 focusing on how a jury is going to assess this case.

14 MR. YALOWITZ: It is really aggravating because we  
15 have got a lot of work to do here. Mr. Satin says he wasn't  
16 going to reargue the ruling, he then stood up and reargued the  
17 ruling. We all got wrapped up around the axle of about six  
18 words or something. If this is how they are going to try the  
19 case, we are the never going to get it done.

20 THE COURT: If you keep objecting how they try the  
21 case, you won't get it done either. I understand your point.

22 MR. YALOWITZ: I'll keep my mouth shut.

23 THE COURT: That is why I am here. It is time for the  
24 parties to start to focus. You know we are going to trial. We  
25 have got a lot of work to do. This case is going to turn out

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1 to be a lot more direct, simple, and straightforward for this  
2 jury than lawyers think. It is time to strip away the legalese  
3 and the lawyer stuff and start thinking about this case like a  
4 jury, because that is what you're going to have to start doing  
5 starting tomorrow, and figure out whether the jury is really  
6 going to sparse these kinds of statements the way you're  
7 barring it now in terms of wanting to keep everything out.

8 You need two things to keep something out. To make an  
9 objection, you need a ground for it to object and you need a  
10 reason to want to object. I think I understand your ground for  
11 objection, I just don't understand the reason why you're  
12 objecting to this statement. This says absolutely nothing  
13 about the PA or PLO or anything about that or played any part  
14 in his decision to be involved in five terrorist attacks.

15 You may see the world differently than I do. Maybe  
16 you see it as something dangerously close to accusing the PA or  
17 the PLO. Fine. Then if you want to convince me that this is  
18 critical to keep out, I will always re-evaluate it in context.  
19 I just don't want to keep spinning around and around on this.  
20 That is my view at this point. I wouldn't expect that that  
21 ruling would make either side happy, because neither side knows  
22 exactly what it wants.

23 Let's see if we can wind this up. I am still working  
24 on jury instructions. Hopefully by Monday we will have  
25 something to give you, at least a draft. I am still looking at

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1 some of the expert testimony. Some of it is beyond the  
2 concerns that I raised. The more I look at it, I am not in a  
3 position at this point where I feel that I can simply say I am  
4 precluding an expert. I have been focusing on what the expert  
5 is really going to say and whether they have got a lot to say,  
6 little to say, some stuff is inadmissible stuff and whether or  
7 not there is an expert that I would say, don't show up, or I  
8 can say, look, he can show up, he is going to testify on these  
9 matters, which is going to take five minutes rather than the  
10 matters that you thought were going to take three hours. They  
11 are not going to opine on certain issues or express opinions.

12 Let me address whatever you want to address, but I am  
13 going to characterize it as the trial exhibits, the 31 trial  
14 exhibits. I don't have a total position on all of them, so I  
15 need a little bit more information. I am going off of page 2  
16 of the December 30 letter. There are a couple of questions.  
17 The ones I don't have questions with, I will still come back.

18 Let me start with number two. The U.S. government  
19 reports that basically, if this is accurately characterized --  
20 at the bottom of it, I haven't gone through the entire binder  
21 to get the detail on the dockets -- I don't have a problem with  
22 number two. I don't know if the defense has a problem with it.  
23 If it is simply the report and the findings and the  
24 determination that AAMB is now designated as a foreign  
25 terrorist organization, I don't have any problems with that.

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1           The issues I have with the jury instructions is  
2 because there are certain dates that you can use and certain  
3 dates that you can't. I know that you're focused on that.  
4 There are certain designations that happened after terrorist  
5 acts on some, so I am trying to find a convenient way of  
6 keeping those separate and to instruct on that.

7           With regard to the designation and the report, unless  
8 there is something in these reports that the defendants would  
9 articulate to me that they say shouldn't be before the jury, I  
10 think that, in abstract, I don't have a problem with that.

11           Let me go to three. I have problems with a couple of  
12 those. No problems on the others. I am not sure what the  
13 purpose of the 417 reports are. I don't see why they are  
14 inadmissible.

15           MR. YALOWITZ: Sure. So Guetta attack was in the same  
16 time and the same place with the same MO as all these other 417  
17 attacks. It is offered to show pattern.

18           THE COURT: By whom?

19           MR. YALOWITZ: By the 417 terrorists.

20           THE COURT: How do you intend to use that as evidence  
21 against the defendant?

22           MR. YALOWITZ: I think the jury is entitled to infer.

23           THE COURT: That?

24           MR. YALOWITZ: That the attack perpetrated on the  
25 Guetta family was by the same 417 terror cell.

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1 THE COURT: Why does that make the defendant liable?

2 MR. YALOWITZ: Because 417 is defendant's employees.

3 So if 417 is acting pursuant to policy, pursuant to --

4 THE COURT: I'm sorry.

5 MR. YALOWITZ: That's okay.

6 THE COURT: What I didn't understand is, this is just  
7 my ignorance of the fact, you are not saying that 417 is a PA  
8 entity?

9 MR. YALOWITZ: It is.

10 THE COURT: I thought you were saying that it had PA  
11 employees.

12 MR. YALOWITZ: No. They call it 417, but it is like  
13 the U.S. Secret Service.

14 THE COURT: So 417 is an entity within the PA?

15 MR. YALOWITZ: Correct.

16 THE COURT: I didn't know the difference between the  
17 March 5 report and the January 26 report. They don't have  
18 anything to do with any of the incidents here.

19 MR. YALOWITZ: Right. Our incident, they show a  
20 pattern, same geographic location, same kind of target, same  
21 MO, and our case fits the pattern.

22 THE COURT: I know, but do you have some other  
23 evidence that 417 was involved in one of the terrorist attacks  
24 here, or are you just trying to use the inference that this  
25 terrorist attack was like one of the ones the 417 did so they

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1 must have been responsible for this?

2 MR. YALOWITZ: It is not quite the way you said it,  
3 but my evidence is that in that geographic location, which was  
4 the West Bank, during that time period, which was the beginning  
5 of the intifada, there was a series of attacks on civilians  
6 perpetrated by the employees of the most disciplined military  
7 unit of the Palestinian authority, which was called 417.

8 THE COURT: Okay.

9 MR. YALOWITZ: The most disciplined. Those  
10 individuals who are identified in this report, and others,  
11 committed a whole series of attacks and our case fits the  
12 pattern. There is no other reasonable explanation for who  
13 would have done this.

14 THE COURT: Who was identified and/or convicted of  
15 perpetrating the attack here that you want to say is similar to  
16 the 417 attack, and is there any evidence that those  
17 individuals are associated with the 417?

18 MR. YALOWITZ: The report indicates the 417  
19 individuals. I am not going to the jury with an ID of any of  
20 those employees.

21 THE COURT: But you don't have anybody who is  
22 identified as the perpetrator of the act?

23 MR. YALOWITZ: That is correct.

24 THE COURT: Which one are you talking about here that  
25 is, except to the 417?



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1 MR. YALOWITZ: The Guetta attack, January 8.

2 THE COURT: At this point, there is no evidence as to  
3 who committed the Guetta attack.

4 MR. YALOWITZ: There is no perpetrator ID, that is  
5 correct.

6 THE COURT: There is no individual that has been  
7 identified.

8 MR. YALOWITZ: Correct.

9 THE COURT: You want to offer evidence that there is  
10 such a similarity between January 26 and the March 5 attacks to  
11 the Guetta attack, that those people must have committed the  
12 Guetta attack.

13 MR. YALOWITZ: That it is more likely than not that  
14 those people committed the attack because it fits the pattern  
15 and there is no reasonable explanation other than them.

16 THE COURT: What is that pattern?

17 MR. YALOWITZ: With my expert, we made a little map  
18 that takes all of these attacks and puts them on the map where  
19 they were and when they were. As part of my letter I am going  
20 to send you about the summary judgment, I will send you that  
21 map.

22 THE COURT: Are you talking about geographic  
23 similarity? Are you talking about some other kind of pattern?

24 MR. YALOWITZ: Geographic, *modus operandi*, and time  
25 period, and target, Jewish civilians.

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1 THE COURT: What was the date of the Guetta attack?

2 MR. YALOWITZ: January 8, 2001.

3 THE COURT: If the Israeli Minister of Foreign Affairs  
4 investigated and recorded on these other two incidents, there  
5 is nothing in their reports that makes a conclusion that that  
6 was related to the Guetta.

7 MR. YALOWITZ: Correct. It is an inference I am  
8 asking the jury to draw.

9 THE COURT: It is not an inference that they drew?

10 MR. YALOWITZ: They didn't report up or down on the  
11 Guetta attack. They didn't say it wasn't.

12 THE COURT: Right.

13 MR. YALOWITZ: They didn't say it was. They were  
14 silent.

15 THE COURT: I have to look at that more carefully. I  
16 will wait for your letter. It just did not seem to me, unless  
17 I can see a real strong MO that a jury could reasonably  
18 conclude that it is more likely than not that the same people  
19 committed this act --

20 MR. YALOWITZ: You have to look at it. I know you  
21 will look at it carefully.

22 One point of clarification, the Ministry of Foreign  
23 Affairs publishes the English language version of the report,  
24 because they are putting it out, but the investigation is done  
25 by the Israeli Security Agency, which is a legally authorized

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1 agency to conduct investigations on terror attacks. It is a  
2 statement about a legally authorized investigation. I don't  
3 think there is really any doubt about admissibility. I hear  
4 the court's concern is you want to think about it is enough to  
5 go to the jury with the MO, the time period, the geographic  
6 region, and the similarity of victims.

7 THE COURT: Is it your theory to argue to the jury  
8 that the evidence supports that 417 as an entity planned all of  
9 these attacks or that some of the members of 417 individually  
10 planned these attacks?

11 MR. YALOWITZ: When you come to the vicarious  
12 liability piece, I don't think it is that hard because, number  
13 one, we have expert testimony that it is a highly disciplined  
14 unit.

15 Number two, we have the head of the unit who went to  
16 jail for committing terrorist activities. We have expert  
17 testimony that he was very, very close to Arafat himself.

18 Number three, you have these political guidance  
19 magazines telling members of the security forces that our  
20 policy is you have to fight and sacrifice and be part of the  
21 intifada. The reports are useful to see the pattern. They  
22 don't go to the vicarious liability piece.

23 MS. FERGUSON: Your Honor, just to be clear, we do  
24 object to the admissibility of this document under the public  
25 records exception. I can walk through the analysis if you

F16SSOK3

1 would like. I want to make sure that we maintain our objection  
2 under the public records exception.

3 THE COURT: Sure. You say that this doesn't qualify  
4 because they don't have --

5 MS. FERGUSON: They have to authenticate foreign  
6 public records. That is number one. They haven't done that.  
7 This is a print-off off of the Israeli Ministry of Foreign  
8 Affairs website. The Israeli Ministry of Foreign Affairs is  
9 not duly authorized to conduct these sorts of investigations.  
10 Mr. Yalowitz says that it is the Israeli Security Agency, but  
11 we don't have that report. We don't have those.

12 Mr. Yalowitz also would need to lay an evidentiary  
13 foundation for the nature of the investigation, the nature of  
14 the findings. I mean, this is a couple levels of hearsay.  
15 They haven't met the foundation as to each level.

16 THE COURT: Mr. Yalowitz, I'll put it to you this way,  
17 you will have to lay some foundation because I am not sure at  
18 this point what I am going to consider to be enough, but you  
19 can't just get up and say, I found this on Wikipedia.

20 MR. YALOWITZ: Right.

21 THE COURT: You know what I am saying?

22 MR. YALOWITZ: I would say, your Honor, number one,  
23 there they go again. It is every objection in the book.

24 Number two, there is no genuine dispute as to the  
25 authenticity of this document. We can get an Internet hotspot

F16SSOK3

1 in here and go to the website and pull it off and look at see  
2 that it is a government website.

3 But we have, as an expert witness, a former ISA agent  
4 who can explain what the ISA is, what they do, how their  
5 investigations work, that this was a legally authorized  
6 investigation.

7 THE COURT: Has this person looked at these documents?

8 THE VIDEOGRAPHER: Of course.

9 THE COURT: Has this person seen the source from which  
10 these documents came?

11 MR. YALOWITZ: No.

12 THE COURT: Okay.

13 MR. YALOWITZ: No, but that is the nature of a  
14 government report. You don't have to go back into the guts.

15 THE COURT: They know where you got them from?

16 MR. YALOWITZ: You mean like the website?

17 THE COURT: Yes.

18 MR. YALOWITZ: Yes, yes, yes. I thought you meant --

19 THE COURT: Yes. Is this person going to say, yeah, I  
20 know this website.

21 MR. YALOWITZ: Absolutely.

22 THE COURT: This website produces this kind of  
23 information, it is associated with the Israeli government or  
24 with this agency, this is, in fact, a form in which reports are  
25 done?

F16SSOK3

1 MR. YALOWITZ: Absolutely.

2 MS. FERGUSON: Your Honor --

3 THE COURT: I don't know if you are going to meet that  
4 threshold.

5 MS. FERGUSON: Your Honor, we don't have the report of  
6 the Israeli Security Agency, we have the Ministry of Foreign  
7 Affairs summarizing some portion of it.

8 THE COURT: Okay.

9 MS. FERGUSON: The Ministry of Foreign Affairs is the  
10 arm that disseminates, I will say, propaganda. We don't  
11 actually understand and see what the actual investigation and  
12 findings of that investigation are. This is just the Ministry  
13 of Foreign Affairs' spin on it or summary of it.

14 THE COURT: Let me look at it more carefully.  
15 Mr. Yalowitz, obviously you should be prepare to do as much as  
16 you can to lay a sufficient foundation --

17 MR. YALOWITZ: Of course.

18 THE COURT: -- that this is a reliable and trustworthy  
19 document.

20 MR. YALOWITZ: You bet. Of course.

21 THE COURT: I will get back to you. I am not sure I  
22 have a problem with it. I don't know what the next bullet  
23 point about Yasser Arafat with regard to ongoing financing. I  
24 don't know what you say the evidence is. What do you have?

25 MR. YALOWITZ: Sure. These documents that I am

F16SSOK3

1 thinking about, really the next three bullets talk about a  
2 certain kind of document, which is they have raw documents  
3 seized from the PA.

4 THE COURT: Right.

5 MR. YALOWITZ: And they have them in Arabic and then  
6 they have a translation.

7 THE COURT: Okay.

8 MR. YALOWITZ: And then they have some analysis.  
9 Arabic documents --

10 THE COURT: What do you have, all of those?

11 MR. YALOWITZ: That's what the report consists of.  
12 The report is an analysis, and then as an appendix they have  
13 the raw documents on which the analysis is based.

14 THE COURT: All right.

15 MR. YALOWITZ: The analysis states facts and  
16 conclusions.

17 THE COURT: From where?

18 MR. YALOWITZ: From the documents.

19 THE COURT: Okay.

20 MR. YALOWITZ: First of all, some of the documents I  
21 want to show to the jury, some of those raw documents, I want  
22 to have my experts explain --

23 THE COURT: What kind of raw documents?

24 MR. YALOWITZ: -- what they are.

25 THE COURT: Financial documents?

F16SSOK3

1 MR. YALOWITZ: Like it is a memo that says, please pay  
2 Raed al-Karmi. He is the guy with the gun, please pay him  
3 \$600. Then Arafat writes okay.

4 THE COURT: Okay.

5 MR. YALOWITZ: That is a good example of one of those  
6 raw documents.

7 THE COURT: I don't understand. Is that part of the  
8 first bullet or second bullet?

9 MR. YALOWITZ: Your Honor, in candor, we have had so  
10 many letters flying --

11 THE COURT: I am shocked.

12 MR. YALOWITZ: -- I can't tell you which bullet it is.  
13 I don't know the bullets on the letter, but I know the  
14 documents.

15 THE COURT: You say, I am just looking at the report,  
16 the documents, the evidence of the Arafat and the PA  
17 apparatuses in the financing, ongoing financing at the time of  
18 the organization.

19 MR. YALOWITZ: Right.

20 THE COURT: What is the form of that evidence?

21 MR. YALOWITZ: That is what I am saying. You have an  
22 Arabic document -- like what I just described, where Marwan  
23 Barghouti says pay Raed al-Karmi six hundred bucks and Arafat  
24 says okay.

25 THE COURT: These documents are what you purport to



F16SSOK3

1 be, they're evidence?

2 MR. YALOWITZ: We know that because the reports  
3 represent them to be that and because our experts are familiar  
4 with the operations of the ISA.

5 THE COURT: Who is the IDA?

6 MR. YALOWITZ: The Israeli Defense. That's the army,  
7 the Israeli defense.

8 THE COURT: And IMFA?

9 MR. YALOWITZ: Israel Ministry of Foreign Affairs. So  
10 then that part of the document I think is kind of easy.

11 THE COURT: Where are you getting these documents?  
12 Again, are they complaining because you're getting them off of  
13 Wikipedia or --

14 MR. YALOWITZ: We are not going to offer a government  
15 report that our expert hasn't gone back to the source and said,  
16 is this your report? Let me check and make sure. Is this an  
17 authentic government report? They will be able to say, yes, I  
18 know it is authentic. It has all the markings of the agency.  
19 I used to work with that agency, I know, I went and checked. I  
20 talked to the guy who wrote the report.

21 This notion that like, oh, these documents are  
22 inauthentic in some way is such malarkey. If we can focus on  
23 the merits instead of all these hindl-dreck objections, we  
24 would do a lot better.

25 THE COURT: Your IMFA status report on the Zinni list,

F16SSOK3

1 you are offering that to show that these people, after having  
2 been identified as committing terrorist acts, continued to be  
3 employed by the PA?

4 MR. YALOWITZ: Correct.

5 THE COURT: Is that the main objective?

6 MR. YALOWITZ: Correct.

7 THE COURT: The IBF report you say will demonstrate a  
8 logical conclusion that money is flowing from the PA and PA  
9 apparatuses to designated terrorist organizations.

10 MR. YALOWITZ: Predesignation, just plain old terror  
11 organizations and then post designation to designated terror  
12 organizations.

13 THE COURT: So you are not saying that the flow of  
14 money was interrupted.

15 MR. YALOWITZ: The designation didn't seem to bother  
16 them.

17 THE COURT: All right.

18 MS. FERGUSON: Your Honor, if I could just address  
19 these past few documents we talked about. One, this document  
20 on the most wanted terrorist status report doesn't fall within  
21 the public records exception. Again, it is just the Ministry  
22 of Foreign Affairs as sort of the public relations arm of the  
23 Israel.

24 THE COURT: Let me ask you this as Mr. Yalowitz would  
25 argue. Is it true?

F16SSOK3

1 MS. FERGUSON: The question is --

2 THE COURT: That is the real question.

3 MS. FERGUSON: The question is does it come within the  
4 exception of the hearsay?

5 THE COURT: That wasn't my question.

6 MS. FERGUSON: I have no idea.

7 THE COURT: Is it true?

8 MS. FERGUSON: I have no idea.

9 THE COURT: That's unanswered. You're not saying that  
10 you're in a position to say that this is untrue and you are not  
11 saying that you're in a position to say that these reports are  
12 accurate reports?

13 MS. FERGUSON: That's right. I am saying it is  
14 uncommon within the public records exception because --

15 THE COURT: You wouldn't know whether or not these  
16 people were still employed by the PA as represented in this  
17 bullet point, you wouldn't know that?

18 MR. YALOWITZ: Two of the guys, your Honor, are Abdel  
19 Karim Aweis and Nasser Aweis. They are still on the payroll  
20 today.

21 MR. HILL: This doesn't say that.

22 THE COURT: Both are still employed by the PA and that  
23 they committed terrorist acts. That's what I was just asking.  
24 I am trying to genuinely figure out whether or not --

25 MS. FERGUSON: That is not what the report says.

F16SSOK3

1 MR. YALOWITZ: The report says they were on a list of  
2 33 terrorists handed to Arafat.

3 THE COURT: Right.

4 MR. YALOWITZ: We have Arafat on videotape admitting  
5 he got the list from General Anthony Zinni. Then these are  
6 guys who work in the intelligence service. You would think  
7 that the intelligence service could find their own employees.  
8 I mean, they are paying them to come to work. They're the  
9 intelligence service. Instead of arresting them, they are  
10 letting them run terror operations. They do terror operations,  
11 including the two of the ones in our case.

12 THE COURT: That is not what this says.

13 MR. YALOWITZ: No, I am telling you the facts. You  
14 want to know the truth, this is the truth.

15 THE COURT: I don't know where you're getting those  
16 facts. I am dealing with what you say is admissible evidence  
17 and you say the only admissible evidence on this issue that I  
18 am concerned about right now is that the report says that they  
19 were handed over or identified as individuals who committed  
20 terrorist acts and you say identified to Arafat.

21 MR. YALOWITZ: Right.

22 THE COURT: Having been given this information, they  
23 continued to be employed, continuously employed, by the PA.

24 MR. YALOWITZ: That they weren't arrested. In other  
25 words --

F16SSOK3

1 THE COURT: That is not what this says.

2 MR. YALOWITZ: Well --

3 THE COURT: It says both are still employed by the PA.

4 MR. YALOWITZ: Where are you, your Honor?

5 THE COURT: I am looking at the IMFA published report  
6 on the Zinni list.

7 MS. FERGUSON: I am looking at a Exhibit 354.

8 THE COURT: I am just looking at your bullet point.

9 MR. YALOWITZ: That sentence is just color. I can  
10 prove that from other stuff.

11 THE COURT: I know, I am trying to get the import of  
12 this statement and that is not --

13 MR. YALOWITZ: The only thing the document does is it  
14 says these guys were on the Zinni list.

15 THE COURT: Right.

16 MR. YALOWITZ: And we, the Israeli authorities,  
17 arrested them in April.

18 THE COURT: You are going to have evidence that this  
19 Zinni list was given to Arafat?

20 MR. YALOWITZ: In December, correct.

21 THE COURT: And that even though they got the list --

22 MR. YALOWITZ: They didn't arrest him.

23 THE COURT: -- they didn't arrest him or terminate  
24 him.

25 MR. YALOWITZ: Correct. Exactamundo.

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THE COURT: What about that is not true?

(Continued on next page)

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1 MS. FERGUSON: The question is whether the document  
2 establishes --

3 THE COURT: No, see, you can't do that. You're not  
4 going to be persuasive that way. When I ask you a question,  
5 answer my question, not give me another question.

6 What about that is not true?

7 MR. ROCHON: Do you have the exhibit in front of you?

8 THE COURT: Yes, I do.

9 MR. ROCHON: Okay, if you look at exhibit 354 that  
10 we're talking about, instead of his letter, then we can get to  
11 this issue. This is the thing we don't agree with, what is in  
12 here as being true. What it says is, it says that Israel  
13 presented Zinni with this list, and talks about five of these  
14 people and says that five of these have been arrested by Israel  
15 and goes on and describes this.

16 We don't agree that, number one, that this was given  
17 to our client. We don't agree that it was public --

18 THE COURT: You deny it, that it was given to your  
19 client?

20 MR. ROCHON: We have no evidence that it was given --

21 THE COURT: That's two different issues. I asked you  
22 whether you deny it was given to your client. You say you  
23 don't deny it, because you don't know.

24 MR. ROCHON: Yeah, I can't say that I know, because I  
25 haven't spent every minute of my life with Yasser Arafat before

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1 he died. And they claim they gave it to Arafat. So how can I  
2 possibly say --

3 MR. YALOWITZ: Mr. Rochon doesn't know the evidence.

4 MR. ROCHON: Excuse me, sir?

5 THE COURT: Is your argument -- is your argument that  
6 you think that this is inaccurate information to give to the  
7 jury, or do you just want to put a stumbling block in their way  
8 and not let them use it.

9 MR. ROCHON: We believe this is inaccurate  
10 information.

11 THE COURT: What is inaccurate?

12 MR. ROCHON: We don't know --

13 THE COURT: So how can you say this is inaccurate, if  
14 you don't know what accurate is.

15 MR. ROCHON: Because accuracy, if you ask me to admit  
16 that it is accurate, I certainly cannot do that. If you say do  
17 I think it inaccurate, I would say yes, because it seems to me  
18 to lack any evidentiary foundation.

19 THE COURT: That doesn't make it inaccurate, that it  
20 doesn't have evidentiary foundation. That's lawyer talk. I'm  
21 asking you is it true, and you guys want to tell me it lacks  
22 evidentiary foundation.

23 MR. ROCHON: One of our disconnects, as the Court  
24 might imagine, for the Palestinian authority or PLO to sit in a  
25 court and be sued and have most of the evidence come in from



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1 off some website at foreign affairs -- and it is on their  
2 website -- as supposedly proving the truth of underlying facts  
3 under the public records exception, is obviously very  
4 difficult.

5 THE COURT: No, not necessarily. Because you should  
6 know whether those facts are true or not. And your records  
7 should show whether they are true or not. You in the best  
8 position, and a better position than the other side to know  
9 whether this information is true or not.

10 MR. ROCHON: Actually, no, your Honor.

11 THE COURT: You're not? Why?

12 MR. ROCHON: Because --

13 THE COURT: They say they gave this information to  
14 you.

15 MR. ROCHON: Well, what do you mean?

16 THE COURT: Your records should indicate that you  
17 either have this information or you don't have this  
18 information.

19 MR. ROCHON: We have no evidence of this being --

20 THE COURT: I understand that. But that's not saying  
21 that there is any reason for me to think that they are in a  
22 better position to know this, than you are in a better position  
23 if somehow your clients don't know what they knew.

24 MR. ROCHON: One reason --

25 THE COURT: I mean that's your argument.

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1 MR. ROCHON: Well, for instance, they have all of this  
2 stuff on 417 that they are talking about.

3 THE COURT: You know what 417 is.

4 MR. ROCHON: I have no knowledge of 417's --

5 THE COURT: Your client does.

6 MR. ROCHON: Well, if I could finish, your Honor.

7 I, and my client, don't have knowledge of 417 engaging  
8 in the acts that the plaintiffs, and apparently some report  
9 that is then summarized on some website ascribes to them. I  
10 have not seen the report that has summarized it.

11 THE COURT: And your clients were totally unaware  
12 there was such a report.

13 MR. ROCHON: The Ministry of Foreign Affairs website  
14 is a public website.

15 THE COURT: That's not what I asked. I asked a very  
16 simple question. You gave me an avoidance.

17 MR. ROCHON: I have been aware of it -- through the  
18 litigation, I have been aware of it.

19 THE COURT: Your clients were not aware of this report  
20 prior to the lawyers becoming aware of it.

21 MR. ROCHON: Of the Ministry of Foreign Affairs.

22 THE COURT: Of the 417 reports.

23 MR. ROCHON: I have no reason to believe they were  
24 aware. But I certainly don't think they monitor the Foreign  
25 Affairs website to establish the truth or lack thereof of

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1 Israel's disagreements with my client.

2 MR. YALOWITZ: Your Honor, can we go back to --

3 MR. ROCHON: Fundamentally, the question is -- I know  
4 the Court often says is it true in the face of an evidentiary  
5 objection.

6 THE COURT: Okay --

7 MR. ROCHON: And --

8 THE COURT: -- I want to know if there is a legitimate  
9 objection, or are you just saying I get you on the -- I get you  
10 on technicality. If you want the technicality, I give it to  
11 you, if you deserve it. But I am trying to figure out,  
12 generally, whether you are saying that this is unreliable  
13 evidence and you know it not to be true, and you don't want the  
14 jury to get a false impression. To say you don't want the jury  
15 to get the true impression simply because you have a rule that  
16 you can make them jump over a hoop, so before they can give the  
17 jury the true impression. I'm trying to get some sense of  
18 whether or not you got a --

19 MR. ROCHON: This is quintessentially unreliable  
20 information --

21 THE COURT: Okay.

22 MR. ROCHON: -- is what we're saying to the Court.

23 THE COURT: That's what I'm asking.

24 MR. ROCHON: As far as what was happening, in  
25 particular who was doing shootings in the West Bank during a

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1 period of time of incredible unrest, my client is not in a  
2 position to tell you who did or who did not do those. My  
3 client is also not in a position to allow you to rely on  
4 Israeli Ministry of Foreign Affairs summaries of various  
5 reports they supposedly looked at.

6 THE COURT: I know. But you're not on strong ground  
7 to argue to me that your clients are not in a position to tell  
8 me whether or not in fact they were given information about  
9 people accused of terrorist acts. That they were told that  
10 these people were in their employ, asked to arrest them, and  
11 they decided not to arrest them and decided to continue to pay  
12 them. It is not a strong argument to make to me or to the  
13 jury, I have no idea.

14 MR. ROCHON: Right.

15 THE COURT: That's not a strong argument.

16 MR. ROCHON: Well, right now, what I'm arguing is as  
17 to admissibility of evidence.

18 THE COURT: I know what you are arguing.

19 MR. ROCHON: As far as if the Court were to admit it,  
20 despite it's not reaching the argument of evidentiary basis  
21 that is asserted, we would have to make arguments to the jury.  
22 We have inquired into this issue of the so called Zinni list,  
23 and have not been able to the corroborate that it was ever  
24 provided.

25 MR. YALOWITZ: May I be heard on that?

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1 THE COURT: No, no.

2 MR. YALOWITZ: All right.

3 MR. ROCHON: I know that plaintiffs have a different  
4 view of that. But in our -- we have asked numerous people in  
5 the security apparatus about the supposed provision of the  
6 Zinni list, and we have not gotten any confirmation of that.  
7 There is, people referred to a so-called Zinni list. I have  
8 not seen a complete Zinni list. There is a portion of a fax  
9 that I have seen that is, I think, the plaintiffs claim is this  
10 so-called Zinni list. It does not include any of the  
11 perpetrators in this case that I can tell, although the fax  
12 quality is very bad.

13 So the concern we have, your Honor, is that, no, I  
14 don't think this evidence is reliable.

15 THE COURT: Okay.

16 MR. ROCHON: B, that we have tried to make inquiries  
17 as to the Zinni list. And as to 417 stuff, we don't believe  
18 that it is either reliable or the basis for the assertions.  
19 In terms of whether or not the 417 evaluations investigation  
20 that the plaintiffs want to rely on as their sole evidence of  
21 the Guetta incident, is what they have is a summary of the  
22 Israeli Ministry of Foreign Affairs website, which we have seen  
23 is there, I can see it today if I want. And it purports to  
24 summarize some other report that we have not seen, that I don't  
25 think Mr. Yalowicz' expert has seen.

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1 THE COURT: All right.

2 MR. ROCHON: And so, clearly, that other report may or  
3 may not meet the exception, but a summary of a report is not a  
4 report.

5 THE COURT: I understand.

6 MR. ROCHON: The summary of a 9/11 Commission report  
7 is not the 9/11 Commission report.

8 THE COURT: I understand that. Okay, but, so, Mr.  
9 Yalowicz.

10 MR. YALOWITZ: Thank you, your Honor. This is really  
11 important. Mr. Rochon made a representation of fact to the  
12 Court that Arafat never saw the Zinni list. I want the Court  
13 to remember that, because I'm going to show Arafat on videotape  
14 admitting that he got the Zinni list.

15 So when Mr. Rochon makes a representation of fact,  
16 check up on it. That's all I need to say about that.

17 THE COURT: Let's go to the easy one.

18 I don't see any problems with the -- is there some  
19 objection to the Israeli Police and Ministry of Health report  
20 with regard to the bombing incident?

21 MR. HILL: They're expert opinions. And so they can't  
22 come in under 702, unless the witness is here to be  
23 cross-examined.

24 THE COURT: What's the expert opinion.

25 MR. HILL: Appear to be ballistics reports and autopsy

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1 reports and things of that nature. So to the extent they  
2 contain 702-type opinion evidence, that cannot come in.  
3 Because the witness is not here to be cross-examined. Plus,  
4 they were not disclosed as testifying experts in discovery.

5 THE COURT: Well, I'm not sure what the form of the  
6 reports are. But I'm not sure that they don't, independently,  
7 just like any other medical reports, would be admissible, as --

8 MR. HILL: Well, there is two issues. One is whether  
9 they are hearsay. And so even assuming that they met the  
10 public records exception for that, they also contain --

11 THE COURT: I'm not sure where you find they are  
12 hearsay. They are not renditions of the acts as they took  
13 place. They are just assessments of the scene and the  
14 aftermath of the attack.

15 MR. HILL: Well, your Honor will need to look at them.  
16 Some of them do include evidence about ballistics, types of  
17 weapons, all of those crime scene investigation type things are  
18 the sort of things you would need expertise to testify to.

19 THE COURT: Again, that's a very nice, technical  
20 argument, but are you disputing anything?

21 MR. HILL: I have no idea.

22 THE COURT: You have no idea.

23 MR. HILL: These are -- look, these are documents that  
24 plaintiffs want to offer --

25 THE COURT: Look, you have a pretty good idea of what

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1 in what manner these attacks were carried out.

2 MR. HILL: Your Honor, honestly, we don't. All we  
3 have is hearsay these. Did not occur in our territory. They  
4 were not overseen by investigations by our clients. These are  
5 all investigations done by the Israeli government. We don't  
6 have any firsthand knowledge of these crime scenes, or the  
7 ballistics, or the sorts of things that plaintiffs want to  
8 offer these documents --

9 THE COURT: What is it that you think they are going  
10 to put before the jury that is gonna hurt you that you don't  
11 want them to hear?

12 MR. HILL: We would have to go through each report one  
13 by one, do you want to do that?

14 THE COURT: No, I want you to tell me, in general, why  
15 you are standing here arguing that it shouldn't come in?

16 MR. HILL: Very prejudicial to us.

17 THE COURT: Why? In what way? Prejudicial means they  
18 are going to put before the jury something that you don't want  
19 them to put before the jury that is going to hurt you unfairly.  
20 What is that?

21 MR. HILL: The whole detail of the horror of the  
22 scene. It is not relevant to our liability.

23 THE COURT: Okay, that's -- if that's your argument, I  
24 understand your argument. You want to keep out the detail of  
25 the horror of the scene.



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1 MR. HILL: Yes.

2 THE COURT: Okay.

3 MR. HILL: And the opinions and the hearsay that it is  
4 based on.

5 THE COURT: So even if it accurately reflects the  
6 horror of the scene --

7 MR. HILL: We are --

8 THE COURT: -- you don't want it in, because you don't  
9 want the jury to know how bad the scene was.

10 MR. HILL: Not relevant to our liability, and to the  
11 extent the plaintiffs didn't perceive the scene, it's not a  
12 relevant to their damages and so it shouldn't come in. It  
13 doesn't have any probative value.

14 THE COURT: It does have probative value. The jury is  
15 clearly entitled to know what happened on that day.

16 MR. HILL: Yes, but they don't need to know the  
17 details of the bomb and the dispersal of the weapons and  
18 anything else.

19 THE COURT: Why would they not be entitled to know  
20 that? You wouldn't be arguing that they were not entitled to  
21 know that. If there was an expert saying I was there, or  
22 witnesses who were there say I saw it and this is what  
23 happened. And I did this. And I took tests. You wouldn't be  
24 arguing to me they are not entitled to hear that.

25 MR. HILL: Some of these you have already ruled on,

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1 the gorey photos.

2 THE COURT: I'm not talking about gorey photos. I'm  
3 talking about the report itself, the details of the worded  
4 record.

5 MR. HILL: Well, I have objections both to the form of  
6 the evidence, which is my 702 and 801 objection.

7 THE COURT: Okay.

8 MR. HILL: And I have a relevance and probative  
9 objection. And I'm making both of them.

10 THE COURT: Your relevance and probative objections  
11 are very weak. That's like saying to me that this is a trial  
12 about a bank robbery, but the jury shouldn't hear the details  
13 of how the bank robbery took place.

14 MR. HILL: Right.

15 THE COURT: It's a legitimate argument to make.

16 MR. HILL: The defendant's liability does not turn on  
17 what the crime scene looked like afterwards.

18 THE COURT: It may. It may.

19 MR. HILL: No, it doesn't.

20 THE COURT: They have to prove that there was a  
21 terrorist act, and they have to prove what the terrorist act  
22 was, and they have to prove your involvement in that terrorist  
23 act.

24 MR. HILL: Right. And this doesn't go --

25 THE COURT: How are they supposed -- what -- are you

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1 going to concede that there was a terrorist act?

2 MR. HILL: Your Honor has already indicated that you  
3 are going to admit evidence of the convictions, which include  
4 the facts of the attack, it includes the identities --

5 THE COURT: No, it doesn't. It doesn't include the  
6 entire facts of the attack. The jury is entitled to have  
7 somebody -- you wouldn't be arguing that if there were five  
8 witnesses to an attack, the jury can't hear what they say  
9 happened at the time the attacks took place.

10 MR. HILL: No. And if the plaintiffs, who perceived  
11 the attack, are going to testify about their personal knowledge  
12 of the attack, I would concede that they would be entitled to  
13 testify to that.

14 THE COURT: Right. Then there is no relevance or  
15 prejudice objection.

16 MR. HILL: Yes, there is, your Honor. Because I don't  
17 have this witness here to cross-examine. This is a hearsay  
18 statement by an expert witness, out of court, offered for the  
19 truth, offered for the opinions --

20 THE COURT: In the abstract, I understand your  
21 argument. Your arguments are very weak. Because when I look  
22 behind the veil, I can't decipher what it is you say is  
23 genuinely the factual dispute, okay. That's what weakens your  
24 arguments on a lot of these issues. I understand your  
25 technical argument. They are very well articulated as lawyers,

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1     okay. But in real life, I'm trying to understand what the  
2     prejudice is, understand what is it you don't want the jury to  
3     hear, understand why you say that this gives the jury a false  
4     impression of the facts that you think they should have to  
5     resolve this dispute. And I don't hear it. You are weak on  
6     good reasons for keeping a lot of this stuff out, although you  
7     may be very strong on, quote, legal grounds to -- if I wish, to  
8     rule that, yes, that's a legal ground for me to keep it out.

9             MR. HILL: Well, your Honor, I mean --

10            THE COURT: But, you know, you --

11            MR. HILL: We do make the objections under the rules  
12     of evidence --

13            THE COURT: That's fine. I'm telling you, if you have  
14     a good argument to make about why it really is damaging to you,  
15     all you have to do is tell me that, and I'll keep it out. But  
16     I'm trying to beg that from you. And the fact that --

17            MR. HILL: The reports --

18            THE COURT: -- all of the weeks and months that I  
19     begged that from you, I can't get that from you, gives me less  
20     concern that somehow you are being unfairly disadvantaged by  
21     all of this evidence.

22            MR. HILL: I'll give an example. There is a report on  
23     here about the January 22 shooting. Neither of the plaintiffs  
24     who were injured there have a perception of the aftermath of  
25     that shooting.

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1 THE COURT: Okay.

2 MR. HILL: In our view, the photos of the bus stop,  
3 and the ambulances, and the buildings, and the bullet ridden  
4 cars, it's not going to come in for anything that is probative  
5 in this case. One of the plaintiffs was rendered unconscious  
6 immediately. She has no recollection of the event. The other  
7 one fell onto a bus and was driven away and did not see the  
8 aftermath. That was the testimony we got at depositions. We  
9 ought to not have a hearsay report with photographs of the  
10 crime scene. They are not relevant to plaintiffs injuries or  
11 our liability.

12 THE COURT: I understand that argument. That's a  
13 lawyer's argument. That's like saying that, you know, there  
14 was an attack in the subway, and somebody came up behind me and  
15 hit me in the head with a hammer. So, the jury shouldn't hear  
16 any evidence about what happened after I got hit in the head  
17 with the hammer, because I don't remember anything. That's  
18 just not a logical argument to make. I don't understand the --  
19 well, let's put it this way, that's a logical argument, but  
20 that's not a reasonable argument. And there is a difference.  
21 And lawyers talk in logic. Jurors think in reason. I'm trying  
22 to figure out, that's not an argument to make, oh, they were  
23 rendered unconscious as soon as the attack occurred, so none of  
24 the things that happened while they were unconscious is  
25 relevant for the jury to hear. That's not a legitimate

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1 argument to make. I mean you have to give me a better argument  
2 than that. But, I think I understand your technical argument.  
3 I don't understand how you say you are being unduly prejudiced.  
4 But, you know, I will evaluate it again in that context.

5 I guess the only other thing I skipped over, something  
6 about the confiscation of terrorist funds. I'm not sure what  
7 you were going to -- is that the IMFA report.

8 MR. ROCHON: Bottom of page 3, your Honor.

9 MR. YALOWITZ: Let me consult for one second on that  
10 one. That's the June 19th attack. Let me consult on that for  
11 a second.

12 THE COURT: All right.

13 MR. YALOWITZ: Okay. So, this is a case where the  
14 Court dismissed the vicarious liability claim, so --

15 THE COURT: Still in this case.

16 MR. YALOWITZ: So I think it is still in, and let me  
17 explain why. I'll tell you what the report is, and I'll tell  
18 you why I want it, and you can consider it.

19 All right. So, the report is a terror fund. It's a  
20 report of a terror fund freezing operation. So the Attorney  
21 General's office, the Israeli Security Agency, and somebody  
22 else, probably the IVF, investigated and found people who were  
23 financing terror, and seized their bank accounts. And these  
24 pair of documents reported on that operation. So it was a  
25 legally-authorized investigation. And, in fact, it is I mean

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1 it's like OFAC. You know, OFAC makes an announcement, we seize  
2 the funds of, you know, John Doe, then it is evidence.

3 THE COURT: So whose funds did they seize?

4 MR. YALOWITZ: The seized the funds of Naef Abu Sharkh  
5 was a PA employee. Now, your Honor --

6 THE COURT: Seized his personal funds?

7 MR. YALOWITZ: Yes.

8 THE COURT: Okay, so --

9 MR. YALOWITZ: Now, your Honor said that's not enough  
10 to go to the jury on vicarious liability. We accept that  
11 ruling.

12 THE COURT: Okay. I'm trying to figure out, I mean --

13 MR. YALOWITZ: What's left. Why do we still want the  
14 report.

15 THE COURT: And why is that evidence that the PA's  
16 funds were being used?

17 MR. YALOWITZ: No. No, well, there is other evidence.  
18 And this is why I still want the document. There is other  
19 evidence that he was a -- that this individual was a conduit  
20 for funds to and through Al Aqsa Martyrs Brigades which, by the  
21 time of the attack, was a designated terror organization.

22 THE COURT: What does that have to do with the PA?

23 MR. YALOWITZ: The evidence is that the PA supplied  
24 money to Al Aqsa Martyrs Brigade through him.

25 THE COURT: And what's the evidence of that?

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1 MR. YALOWITZ: There is other evidence.

2 THE COURT: Why do you say that? Is there evidence of  
3 that or was that somebody's conclusion?

4 MR. YALOWITZ: There are confessions of other people  
5 who said I got money from that guy, from Naef Abu Sharkh.

6 THE COURT: How does that still say that that is the  
7 PA's money.

8 MR. YALOWITZ: I have to look, but I think that the --  
9 I think that it's a reasonable inference that, in the context  
10 of a pattern of giving money to the Al Aqsa Martyrs Brigade  
11 through operatives, like Naef Abu Sharkh, this guy was one of  
12 the people that Al Aqsa -- that was one of the Al Aqsa members.

13 THE COURT: And how do you intend to demonstrate that  
14 there was a pattern, such a pattern.

15 MR. YALOWITZ: Well, we have the raw documents. We  
16 have the government reports. We have convictions. We have  
17 confessions. So, we have got --

18 THE COURT: Well, wait, no. I'm just focusing on the  
19 providing of cash money.

20 MR. YALOWITZ: That's what I'm talking about. That's  
21 what I'm talking about. We have raw documents saying give this  
22 guy 600 bucks, give that guy 300 bucks, give that guy 800  
23 bucks.

24 THE COURT: Okay, but that doesn't -- I don't know  
25 which guy you are talking about. Are you talking about --



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1 MR. YALOWITZ: And then we have other documents that  
2 can match those up that say these were Al Aqsa fighters. Or  
3 these were Fatah fighters.

4 THE COURT: And this money was given, for what  
5 purpose?

6 MR. YALOWITZ: Well, I think the reasonable  
7 inference -- we have documents saying here's who the Fatah  
8 fighters are. And you have documents that say give these guys  
9 money. And it's the same guys. I think it is reasonable to  
10 infer that you're giving money to these guys for killing  
11 civilians.

12 THE COURT: And is there any other relationship or  
13 reason to give these guys money?

14 MR. YALOWITZ: Not that I have been able to discern.  
15 I mean we have intelligence reports from the defendant's  
16 intelligence service saying here's a detailed report on the  
17 various Fatah fighters. This guy did a great quality  
18 operation, which is a suicide mission, you know, which I can  
19 tell you is a suicide mission that killed civilians. So you  
20 have to piece it together. It is a mosaic.

21 THE COURT: Okay.

22 MR. YALOWITZ: But, in my opinion, this report is a  
23 piece of the mosaic.

24 THE COURT: All right.

25 Yes.

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1 MS. FERGUSON: Calling it a report, again, it is  
2 another Israeli Ministry of Foreign Affairs website release.  
3 It is not as though they did some investigation. And, in fact,  
4 it is evident from the document, I'm looking at plaintiff's  
5 exhibit 339, that the Ministry of Foreign Affairs is reporting  
6 on something, quote, "communicated by the GPO," which I believe  
7 is the Government Press Office, who then is reporting on  
8 providing I guess GPO or Ministry of Foreign Affairs you know  
9 statement about Naef Abu Sharkh. And the Court already looked  
10 at this document and found that it didn't create any evidence  
11 in the Naef Abu Sharkh to the Mandelkorn incident. It doesn't  
12 come in under any hearsay exception.

13 And I would also just like to point out that this  
14 whole notion that there is some pattern of funding of AANB or  
15 Fatah activists, you know, Mr. Yalowicz quickly goes to  
16 custodial statements and convictions where he is relying on the  
17 very thing the Court said we can't rely, somebody indicating a  
18 third-party blame shifting. And he has submitted all these raw  
19 documents. There is only two raw documents that even  
20 admissible show any payment. They are not of any of the  
21 perpetrators at issue and of very small amounts of money and  
22 don't say anything about why they were provided. So this is  
23 really a house of cards here. And I want to make that clear,  
24 because it sounds like there is more evidence than there is.

25 THE COURT: All right. Let's do this. I'm going to

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1 try to resolve all of these issues by Monday when we talk. I  
2 would like to get together again on Monday morning.

3 Tomorrow, let's convene again at 9:30 in the  
4 courtroom.

5 MR. YALOWITZ: Your Honor, may I, before we break,  
6 I --

7 THE COURT: Let me finish my thought.

8 MR. YALOWITZ: I'm sorry.

9 THE COURT: I just want to, procedurally, let you know  
10 how we have got this scheduled.

11 We are going to start here at 9:30, continue some of  
12 these conversations. We'll talk about other issues if we need  
13 to, tomorrow, as we are getting the jurors together.

14 What we're going to do, is I'm going to, once they  
15 have given the jurors orientation, it should be about 200.  
16 They are going to be given numbers, randomly. When they tell  
17 me that they are ready tomorrow to give out the questionnaires,  
18 we will simply go down to the jury room and we will convene  
19 down there. I'll give the jury the preliminary instructions,  
20 substantially the same or similar to what I just gave out,  
21 telling them that this is what the case is, this is what we're  
22 asking them to do. And, then, I will have the jury room call  
23 the numbers out one at a time, so they can get their  
24 questionnaire. And then they will all get their questionnaire,  
25 and they will fill out their questionnaires. And we should,

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1 hopefully we can do that process before lunch. And they can  
2 either fill out their questionnaires by lunchtime or by early  
3 afternoon. And we'll have the questionnaires by early  
4 afternoon, at the latest.

5 I will give the questionnaires to the parties. You  
6 should go right away and make arrangements to make the copies,  
7 give me back the originals, and give me back the original and  
8 make copies for each one of you. And then start going through  
9 the questionnaires. I'll also start going through the  
10 questionnaires, the same process that you are going through.  
11 I'll need your responses by Friday, the earlier the better, if  
12 you can get it, no later than 3:00. If you can get it to me  
13 2:00 or 3:00 so we can exchange them, and give me -- if you  
14 want to -- you can go ahead and exchange them if you want, your  
15 responses, and then e-mail them to me so you'll have the forms.  
16 You'll have each other's forms. It won't be a mystery as to  
17 what I'm going to do. And you'll probably go through the same  
18 process. As I said, I'm just going to go down and compare the  
19 two. And every time I see a match, in that order, we'll order  
20 that they be seated. And those are the jurors that we're going  
21 to further select from. Hopefully, we'll get 20 or 30, at the  
22 minimum. If not, then I'll do the process, as I indicated.  
23 I'll pick the first person on the list that the plaintiffs say  
24 is acceptable, and then the second person will be the second  
25 person on that list, that the defendants said was acceptable,

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1 but that the plaintiff didn't challenge, say they had a valid  
2 challenge for cause.

3 So we will have all of those we will make calls to. I  
4 need it by Friday, so that early Friday we can all know who  
5 those possible people are gonna be. Let me say I'll shoot for  
6 30 at this point. I think that should be more than enough.  
7 There may be some other people who come up with good reasons  
8 why they can't serve, either for challenge for cause or some  
9 scheduling problem. So 30 should be enough to get us 12  
10 jurors, as I say, three peremptories per side.

11 So I will be able to tell the jury room before the end  
12 of the day Friday that they can contact the jurors, say the  
13 first 50 jurors that we have on that list, to come back on  
14 Tuesday morning. And I'll have them report back to the jury  
15 room on Tuesday. And when they all report back to the jury  
16 room. Then we'll bring them up from the jury room here. And  
17 then be conscious of, not overly aggressive, but be conscious  
18 of, you know, minimal contact between potential jurors and  
19 jurors and the parties and the audience and press, and that  
20 sort of thing. So, I'm still working on that process to get  
21 them in and out, so people don't get on the elevator with  
22 jurors, and talk about stuff in the hallways. Obviously, my  
23 rule is don't speak to any of the jurors. And I'll instruct  
24 them to not speak with you. And even anybody in the audience,  
25 they should obviously not talk about the case. They really

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1 shouldn't, no one should talk about the case unless you are in  
2 a room. I will give both sides a witness room. You can use it  
3 any way you want. Small witness room on the side for the  
4 witnesses, or for you to store stuff while trying the case.

5 So Monday morning the jury room, we'll call the  
6 jurors, tell which one should report, which ones shouldn't. If  
7 there is a real issue with the list, let me know if you can as  
8 early as possible, Friday, Saturday, Sunday, or before Monday,  
9 you know, by then. Because the phone calls will start to be  
10 made telling people that they should report the next day and  
11 telling people which people shouldn't have to report. So I  
12 think that we'll meet Monday at 9:30. And we'll continue and  
13 we'll finish up. I'll give you definitive rulings as I can on  
14 the issues that are still outstanding. And then we'll be  
15 prepared to move forward.

16 On Tuesday, I may ask some basic questions to each of  
17 the jurors. But, obviously, I'm not going to repeat all of the  
18 questions. I just want to get some feel for their personality  
19 and/or make sure that they can reaffirm that they could be fair  
20 and impartial jurors on both sides, and nothing has changed  
21 since they filled out the questionnaire.

22 And, then, I'll have people, both sides, exercise  
23 their challenges to the first -- again, no sense to exercise  
24 challenge to anyone other than the first 18 in the box, because  
25 you only have three challenges, and you are not going to end up

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1 with 12. So a challenge to juror number 19 is a wasted  
2 challenge. So we will do that.

3 And then I would anticipate the parties should be  
4 ready to open on Tuesday and be prepared to start with the  
5 first witness, depending on how long the opening is gonna be.  
6 And a steady flow of witnesses.

7 And then we can talk a little bit more about what the  
8 real length of the trial is but, frankly, I don't think it  
9 should take 10 weeks. And I think, given the nature of the  
10 issues, and some of the rulings that I think we're talking  
11 about, it's a good seven or eight weeks, not much more than  
12 that.

13 MR. ROCHON: In that regard, your Honor, I thought --  
14 I think your current presentation to give the jurors says 10 to  
15 12 weeks. I would ask, I mean I know you want to keep an  
16 outside limit, so we never go longer than you predicted, I  
17 recognize your credibility is important, you might want to give  
18 them a bottom number that is more optimistic than 10; 6 to 12,  
19 7 to 12, something like that, so we don't get people who will  
20 answer their questions more aggressively if they think it is --

21 THE COURT: I'm sensitive to that. And what I need  
22 from you, by Monday -- and we can agree upon a time frame -- is  
23 that you just have to give me a realistic approximation of how  
24 many witnesses each side thinks that they will call and how  
25 long it would take to present their evidence, okay. So I can

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1 know the number of people we have to deal with. And give me  
2 the number of people, there are a lot of documents, and maybe  
3 deposition testimony that we still have to address. So if you  
4 can give me your best estimate of how many live witnesses we  
5 are going to see, and how long you think it might take. So if  
6 we're talking, you know, four weeks, for plaintiff and three  
7 weeks for defense, we're probably more likely talking two to  
8 three weeks for the plaintiff, one to two weeks for the  
9 defendants. So you're right, I don't want to scare the jurors  
10 off, making them think that it is going to be too long.

11 I'm usually pretty good with giving them an accurate  
12 count of what the length of the trial will be. And I do  
13 usually likely make it end a little earlier than I expected,  
14 but I don't want to give them too much of a time frame, because  
15 this is going to be a major commitment for them. And so we'll  
16 address that on Monday.

17 And we'll go, I'm going to start clearing my calendar  
18 so that we can start 9:45 in the morning and go until just  
19 before 5:00 every day until we finish. And I'll sprinkle some  
20 other cases in between in terms of short appearances or over  
21 the lunch period. But, otherwise, you can expect that I would  
22 expect a steady flow of evidence and witnesses every day until  
23 we finish. I think that, you know, I think we can efficiently  
24 get through that in a reasonable amount of time.

25 MR. ROCHON: On that, I apologize. If we show that we



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1 move things along after couple of weeks, I would ask the Court  
2 to consider taking Fridays off, if we are making good progress.  
3 I know we don't want to do that until we see how we're doing,  
4 but --

5 THE COURT: It's more likely we'll take a couple of  
6 Fridays off, a few Fridays off. I don't want to get into the  
7 pattern that every Friday we have off. I think the jurors  
8 don't like that, either. I mean they like that -- I mean if we  
9 have five weeks of trial and you take every Friday off that  
10 adds another week to the trial. So that's why I'm concerned  
11 about adding another two or three weeks. I'm probably going to  
12 commit to the jurors -- I mean, remember, we have president's  
13 day off. We have also Lincoln's birthday off. And that's  
14 Thursday. And Monday is president's day, February. So it's  
15 likely that I'm going to give everybody the day after Lincoln's  
16 birthday off. So it will be Thursday, Friday, and Monday. And  
17 everybody will have off as a long weekend. I'll at least shoot  
18 for that. And probably, depending on how we get through  
19 January, and how much more we have to do, I mean if it really  
20 does look like we're two to three weeks out, I might think  
21 about going ahead and committing telling them that we'll have  
22 the next few Fridays off. We'll talk about that and be  
23 flexible for that. So we're committed to this and ready to go.

24 MR. ROCHON: Your Honor, tomorrow, then, after you're  
25 done handing out the questionnaires, I think counsel are then

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1 done with the Court at that point, we'll come back and get --  
2 someone will come back and get the questionnaires for each, but  
3 we wouldn't be reconvening with you.

4 THE COURT: No reason to reconvene after that. We  
5 have to get the questionnaires back. And, hopefully, we'll say  
6 have them back as early as possible for the end of the day.  
7 And then you can spend the rest of the time that you have  
8 discussed to give you the rest of the time to go through them  
9 and so you can get them back to me as quickly as possible, and  
10 we can be prepared to get an adequate number of qualified  
11 jurors that can sit fairly in the case.

12 MR. ROCHON: And second, your Honor, we'll e-mail you  
13 our list, and then we'll send ours to plaintiffs once we know  
14 they have sent theirs, as well.

15 MR. YALOWITZ: I'm sorry?

16 MR. ROCHON: We'll e-mail the Court ours, and you'll  
17 do the same, and we'll exchange after we have each sent --

18 MR. YALOWITZ: I thought we'll pick a time and send  
19 them to the Court and copy each other.

20 MR. ROCHON: Fine, pick a time. I'm fine. We'll work  
21 with that, as well.

22 THE COURT: As far as I'm concerned, you can give them  
23 to each other before you give them to me, I don't care. I  
24 don't want that to be an issue. I will wait. I would say  
25 exchange them with each other before you send them to me,

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1 because once I get them in hand, I want to know at that point  
2 you both have the other side's.

3 MR. YALOWITZ: That's fine.

4 MR. ROCHON: One other preparation thing, your Honor.  
5 I know the Court is going to be ruling on some of the expert  
6 issues on Monday. If the plaintiffs anticipate calling an  
7 expert as one of their first couple of witnesses on Tuesday or  
8 Wednesday, we would like to try to get -- we are talking, I  
9 think might be unusual, I assume they might not do that. We  
10 would like clearance on that. Because it will take longer to  
11 adjust to those, and all of their fact witnesses and all their  
12 plaintiffs. So if we can try to get a sense of when they are  
13 going to call their experts, at least know those first couple  
14 of days, that would be helpful.

15 THE COURT: Right, I --

16 MR. YALOWITZ: Didn't we just go over the 72 hour  
17 rule, I thought. Wasn't that today? I thought we agreed on  
18 the 72 hours.

19 THE COURT: That's what I was going to say I want  
20 to -- you know, you think you can get them that?

21 MR. YALOWITZ: I think I can live up to my agreement  
22 to get them in 72 hours in advance. We talked about other  
23 agreements and they were not interested, and now we have made  
24 an agreement, I can live with that.

25 THE COURT: So when would you do that for Tuesday.

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1 MR. YALOWITZ: So, on Tuesday morning. Let's see,  
2 Monday morning, Sunday morning, Saturday morning; 72 hours in  
3 advance. I can do that.

4 THE COURT: Can we skip the weekends.

5 MS. FERGUSON: Yeah.

6 THE COURT: Friday afternoon.

7 MR. YALOWITZ: I can give it to them Friday afternoon.  
8 If it falls on a weekend, 5:00 Friday.

9 THE COURT: Falls on weekend or holiday, before the  
10 end of the previous business day.

11 MR. YALOWITZ: Sure, gladly, no problem. See, how --  
12 okay, I have just a couple of -- I apologize, I know it is  
13 getting late.

14 But, first of all, can we get our AV people in here on  
15 Friday, so they can work with the Court's AV --

16 THE COURT: Yes.

17 MR. YALOWITZ: As I remember, like the Court has an.  
18 AV department that will put little screens for the jurors?

19 THE COURT: Yeah, we have some courtrooms that are set  
20 up with each one, one for each. See, we don't have that here.  
21 We can probably dispurse a few. It depends. I would be a  
22 little sparing with that, because it usually ends up starting  
23 to get in people's way. The better thing is to let them put  
24 the big screen up. You have the smaller screens and, you know,  
25 decide whether or not you want a couple of screens in the jury

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1 box, at all, as opposed to the large screen.

2 MR. YALOWITZ: Big one up there. Okay, we'll figure  
3 that out.

4 THE COURT: Talk that out with them.

5 MR. YALOWITZ: I love those little touch screens where  
6 you can circle stuff.

7 THE COURT: Yeah, whatever you guys --

8 MR. YALOWITZ: Okay. So, then, also, our -- we have  
9 our lead interpreters so patient all day. And I think she  
10 wants to get in here, maybe Friday, as well, or even in  
11 advance. She can, with the Court's permission, if she can  
12 contact chambers and/or the courtroom deputy or somebody, and  
13 just get in here and make sure that the set-up is as she wants  
14 it for her team, that would be great.

15 THE COURT: That's fine. I'll make Friday available  
16 for all of you to --

17 MR. YALOWITZ: That's fine.

18 Third thing. We wrote a letter. We exchanged  
19 letters, Mr. Rochon and I, some weeks ago, maybe even a month  
20 ago, in which we agreed to split the costs of the court  
21 reporter and the interpreters. And we'll hand up -- I'll try  
22 to get an order to the Court. I know you are going to be  
23 shocked, but apparently there is some debate about the contours  
24 of the agreement we reached. And, you know, I didn't think  
25 splitting costs was all that complicated, but --

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1 THE COURT: Are you going to try to get daily copy?

2 MR. YALOWITZ: I was thinking about next day, but if  
3 you want daily --

4 THE COURT: No, I will take whatever you --

5 MR. YALOWITZ: If you want daily, I'll just borrow  
6 your copy.

7 THE COURT: I don't think the reporters will let me do  
8 it that way.

9 So you check with the court reporters and figure out  
10 what you really want, because they are going to have to  
11 logistically make sure they can staff it to get it to you. I  
12 mean I don't know if there is any real reason to have real time  
13 here, we have done that, and --

14 MR. YALOWITZ: I think the interpreters -- all of our  
15 witnesses are not foreign language speakers. Some are. And I  
16 think the interpreters really want that for those witnesses, so  
17 I think we --

18 THE COURT: Two sides try to agree and then try to see  
19 what you can work out with the court reporters in terms of  
20 whether you are going to do daily copy for the next day, or you  
21 are going to do real time, or --

22 MR. YALOWITZ: We'll figure that out. And I hope  
23 we'll be able to hand up an agreed order but, you know, we have  
24 not been very successful so far.

25 And then the final thing is, in opening, I would like

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1 to be able to put a few -- I mean I'm not going to overdo it,  
2 but put are three or four documents and photographs up in front  
3 of the jury. I am very sensitive to the Court's view that you  
4 don't put anything up in front of the jury unless it is in  
5 evidence. Maybe I'll send you the documents and photographs  
6 and just ask the Court's permission.

7 THE COURT: What I am most concerned about, first, is  
8 anything any side wants to use, whether it is just illustrative  
9 or demonstrative or it's going to be an exhibit in evidence,  
10 whatever you are going to use during opening, show it to the  
11 other side before Tuesday. And so I want to know if the other  
12 side has an objection as to you're using that, whatever it is,  
13 whatever type of objection, before trial. My suggestion is to  
14 try to figure that out early on, maybe even by Friday. Because  
15 if there is a legitimate objection and you have to make a  
16 change, you know --

17 MR. YALOWITZ: Your Honor, I can assure you I will not  
18 offer a document that the defendants don't object to. It's just  
19 the way they roll.

20 THE COURT: That's not going to be my issue. My issue  
21 is going to be whether I agree with them or not. If I agree  
22 with them, you have to be ready to change or go without. So  
23 make it early on, and I can rule. And I mean we already talked  
24 about some things, different wordings and stuff like that.  
25 Those things can be changed at the last minute. But,

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1 otherwise, both of you should know, before you open, what it is  
2 that you are going to use in opening. And if there is an  
3 objection to that, I want to hear it on Monday. If there is  
4 not an objection to it, then I'm probably not going to be  
5 concerned about preventing you.

6 MR. YALOWITZ: Why don't I commit to getting it --  
7 I'll consult with the defendants. I'll commit to getting it to  
8 the Court Thursday. And then if we can get the defendants to  
9 commit to giving their objections Friday. I promise it won't  
10 be a lot of documents, it won't be a lot of slides, but  
11 something. So that I'm not looking at stuff at 7:00 Sunday  
12 night, like I was last night. It is ridiculous.

13 THE COURT: It makes a lot more sense to me.

14 MR. YALOWITZ: All right.

15 THE COURT: All right, then.

16 MR. ROCHON: Thank you, your Honor.

17 (Adjourned)  
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